Selection of Leading Cases

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LAW OF CRIMES

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SELECTION OF LEADING CASES.

LAW OF CRIMES AND THE GENERAL PRINCIPLES OF CRIMINAL PROCEDURE.

KHOSH MAHOMED SIRKAR.

v.

NAZIR MAHOMED.

[*Reported in I.L.R., 33 Cal. 352 s.c. 2 C.L.J. 259=9 C.W.N. 1065.*]

The following is the Order of Reference to the Full Bench by Rampini and Mookerjee JJ. :—

This is a Rule issued by this Court under section 15 of the Charter, calling upon the District Magistrate of Dinagepore and upon the opposite party, who was the first party to a proceeding under section 145 of Criminal Procedure Code, to show cause why the proceedings under that section should not be set aside on the ground that the initial order does not set out the grounds on which the Magistrate considered a breach of the peace likely, as required by the ruling in *Nityanand Roy* v. *Paresh Nath Sen*[1]. It appears that a report was submitted to the Magistrate by the Police on the 23rd of January 1905, on the basis of which he drew up, on the 6th February 1905, an order under Section 145, directing the parties to this Rule to attend his Court and to put in written statements of their respective claims in regard to the fact of actual possession of the land in dispute. The Police report contains ample materials to justify the conclusion that a dispute concerning the land and likely to cause a breach of the peace existed, and the order which was drawn up by the Magistrate ran in these terms: "Whereas it appears from the Police report, dated 23rd January 1905, that there exists a dispute which is likely to cause a breach of the peace between the above-named parties for the possession of 2 bighas and 18 cottas in three plots of land" (then follows a description of the land and the statement of the boundaries), "it is ordered that the said parties do attend, etc., etc." This order was duly served upon both the parties, and was also published by being affixed to a conspicuous place at or near the subject of dispute. The parties thereupon filed written statements, in which they made various allegations as to the actual possession of the subject of dispute and two members of the second party further alleged that they had made no attempt to commit a breach of the peace. No objection was taken by any of the parties, that the initial order which had been served upon them

[1] (1905) I. L. R. 32 Calc. 771.

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was defective, because it omitted to state specifically the grounds upon which the Magistrate was satisfied that a dispute concerning the land and likely to cause a breach of the peace existed. The Magistrate then inquired into the question of possession, in the manner provided by clause (4) of section 145, upon evidence adduced by both the parties, and on the 6th June 1905, made an order under clause (6) of the section in favour of the first party. The second party thereupon moved this Court, and obtained the Rule, which is now under consideration.

It has been argued by the learned vakil, who appears in support of this Rule, that the initial order drawn up by the Magistrate does not state the grounds upon which he was satisfied that a dispute likely to cause a breach of the peace existed concerning the land, that the omission to state such grounds has the effect of rendering null and void the entire proceedings and takes away his jurisdiction to make the final under clause (6), and that consequently it is obligatory upon this Court to interfere under section 15 of the Charter and set aside the proceedings as held without jurisdiction. In support of this position reliance is placed upon the cases of *Mohesh Sowar* v. *Narain Bag*[1], *Nittyanand Ray* v. *Paresh Nath Sen*[2], *Sital Mandal* v. *Rajani Kanta Das*[3], and *Bepin Behary Mitter* v. *Nogendra Kumar Bose*, Criminal Revision, 445 of 1905[4], which are all decisions under Act V of 1898. Reference is also made to *Gobind Chunder Moitra* v. *Abdool Sayad*[5], which was decided under section 530 of Act X of 1872, and *Queen-Empress* v. *Gobind Chandra Das*[6], which turned upon the construction of section 145 of Act X of 1882. Our attention is also invited to the case of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen*[7], as an authority for the proposition that wherever jurisdiction is only given to a Court by a Statute, and such jurisdiction is only given upon certain specified terms contained in the Statute, these terms must be complied with in order to create and raise the jurisdiction; and if they be not complied with, the jurisdiction does not arise. It is further argued, upon the authority of *Queen* v. *Bholanath Sen*[8], that criminal proceedings are bad, unless they are conducted in the manner prescribed by law, and if they are substantially bad in themselves, the defect is not cured by any waiver or consent of the prisoner. It is contended, on the other hand, by the learned Counsel, who appears to show cause, that inasmuch as the Police report contained ample materials to satisfy the Magistrate that there was a likelihood of a breach of the peace, it was sufficient compliance with the law for the Magistrate to cite it as the ground of his proceeding on which he was satisfied that a dispute within the terms of section 145 existed. In support of this proposition reliance is placed upon the case of *Goluck Chandra Pal* v. *Kali Charan De*[9], and *Dhanput Singh* v. *Chatterput Singh*[10]. It is further argued that, assuming that the initial order did not contain a specific statement of the grounds, the order was at most defective in form, and such defect neither affected the jurisdiction of

[1] (1900) I. L. R. 27 Calc. 981.
[2] (1905) I. L. R. 32 Calc. 771.
[3] (1905) 9 C. W. N. ccxxi.
[4] (1905) Unreported.
[5] (1881) I. L. R. 6 Calc. 835.
[6] (1893) I. L. R. 20 Calc. 520.
[7] (1855) 6 Moo. I. A. 134.
[8] (1876) I. L. R. 2 Calc. 22.
[9] (1886) I. L. R. 13 Calc. 175.
[10] (1893) I. L. R. 20 Calc. 513.

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the court nor amounted to an illegality sufficient to vitiate the proceedings, and that it was at most an irregularity, which has not prejudiced either of the parties. In support of this proposition reference is made to the case of *Sabid Mondul* v *Lakshmi Mondal* [1]. It is also contented that it is not obligatory on this Court to exercise its extraordinary jurisdiction under the Charter, as no suggestion is made of any failure of justice by reason of the alleged defect in the initial order. In support of this contention the learned Connsel invites our attention to the cases of *Drobo Moyee Dabee* v. *Bipin Mundul* [2], and *Shoovankurry Dabee* v. *Dwaraka Nath Mookerjee* [3]. After a careful examination of the arguments addressed to us on both sides we are of opinion that the contentions advanced on behalf of the petitioner, though supported to some extent by some of the authorities relied upon, are not well founded on principle and ought not to prevail.

The first ground urged on behalf of the petitioner in support of the Rule is that the initial order is substantially defective, because it does not contain a statement of the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed, and, as authorities for this position, we are referred to *Mohesh Sowar* v. *Narain Bag* [4], *Nittyananda Roy* v. *Paresh Nath Sen* [5], and *Sital Mondal* v. *Rajani Kanto Das* [6]. If the learned Judges who decided these cases intended to lay it down as a hard and fast rule of law that the initial order is defective because it is not self-contained and does not state in express words the grounds which may appear in the Police report on which the order is founded and to which it makes reference, we are unable to accept any such rule. It appears to us that the view taken in the cases of *Dhanput Singh* v. *Chatterput Singh* [7], *Goluck Chandra Lal* v. *Kali Charan De* [8], and *Gobind Chunder Moitra* v. *Abdool Sayad* [9], namely, that a reference by a Magistrate in the initial order to a Police report, which clearly sets out the probability of a breach of the peace, is a sufficient statement of the reasons for his being satisfied of the existence of a dispute likely to cause a breach of the peace, is more reasonable. We are inclined to hold that, in determining whether a particular initial order is defective or not, we ought to look to its substance rather than to its form; and although a reference to any other document ought not to be necessary to ascertain the grounds upon which the Magistrate has proceeded, yet it does not follow that the Police report ought not to be taken as part of the proceeding and by reference incorporated with it. No doubt, if the Police report itself does not disclose any ground for holding that there is a likelihood of a breach of the peace, the position would be different. But where, as in the present case, the Police report sets out sufficient grounds and is expressly referred to in the initial order by the Magistrate, we would hold that such order sufficiently fulfils the requirements of the law. The case of *Nittyanannd Roy* v. *Paresh Nath Sen* [5] is not really opposed to this view, because in that case not

[1] (1902) 7 C. W. N. 599.
[2] (1868) 10 W. R. 6. (Civ).
[3] (1876) 15 W. R. 344 (Civ).
[4] (1900) I. L. R. 27 Calc. 981.
[5] (1905) I. L. R. 32 Calc. 771.
[6] (1905) 9 C. W. N. ccxxi.
[7] (1893) I. L. R. 20 Calc. 513.
[8] (1886) I. L. R. 13 Calc. 175.
[9] (1881) I. L. R. 6 Calc. 835.

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only had the Magistrate not set out in the order the grounds upon which he was satisfied, but he had referred to the result of a local inquiry held by himself, of which there was no report: so that there were no materials on the record which could show what were the grounds upon which the Magistrate had proceeded. It does not appear to us possible, however, to reconcile the other cases which were placed before us, and we are inclined to follow the cases of *Goluck Chandra Pal* v. *Kali Charan De* [1], *Dhanput Singh* v. *Chatterput Singh* [2], and to dissent from the view taken in the case of *Mohesh Sowar* v. *Narain Bag* [3]. As to this last mentioned case, it may be pointed out that the language used in the judgment is perhaps more general than was absolutely necessary under the circumstances disclosed in the report, for the initial order not only did not contain a statement of the grounds, but did not even state the information upon which the Magistrate was proceeding, as it ought to have done according to the cases of *Tarini Charan Chowdhry* v. *Amulya Ratan Roy* [4] and *Manik* v. *Azimuddi* [5].

The second ground urged on behalf of the petitioner in support of the Rule is that the omission to state in the initial order the grounds upon which the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, vitiates the order, renders null and void the whole of subsequent proceedings, and takes away his jurisdiction to make the final order under clause (6). This contention would seem to receive some support from the language of the decisions in the cases of *Mohesh Sowar* v. *Narain Bag* [3], *Nittyanand Roy* v. *Paresh Nath Sen* [6] and *Bepin Behary Mitter* v. *Nagendra Kumar Bose* [7]. We are unable, however, with all respect for the learned Judges who decided these cases, to adopt this view as well founded on principle. It appears to us that the view advanced on behalf of the petitioner does not sufficiently recognise the distinction between the elements which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be exercised. As we have dealt with this matter in our order of Reference to a Full Bench in the case of *Sukh Lal Sheikh* v. *Tara Chand Ta* [8], it is not necessary to repeat here our views on the subject. It is clear that, in order to give jurisdiction to a Magistrate to take proceedings under section 145, it is essential that he should be satisfied that a dispute likely to cause a breach of the peace exists, and such disupte must refer to land or water or the boundaries thereof lying within his local jurisdiction. If these elements exist, the Magistrate is entitled to exercise his jurisdiction, and the first step is the recording of the initial order, the contents of which are specified in the first clause of section 145. If the order does not strictly comply with the requirements of the section, because it does not contain a statement of the grounds upon which the Magistrate is satisfied, it is no doubt defective, but we are unable to appreciate

[1] (1886) I. L. R. 13 Calc. 175.
[2] (1893) I. L. R. 20 Calc. 513.
[3] (1900) I. L. R. 27 Calc. 981.
[4] (1893) I. L. R. 20 Calc. 867.
[5] (1902) 6 C. W. N. 923.
[6] (1905) I. L. R. 32 Calc. 771.
[7] Unreported. Criminal Revision No. 445 of 1905.
[8] (1905) I. L. R. 33 Calc. 68.

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the grounds upon which it is contended that such defective order is one made without jurisdiction. This argument appears to us to be based upon the fallacy that a Court has jurisdiction only to make a correct order, and when it happens to make an order which is incorrect or defective, it acts without jurisdiction; such a view can hardly be maintained after the decision of the Judicial Committee in the case of *Malkarjun* v. *Narhari*.[1] Considerable reliance was placed by the learned vakil for the petitioner upon a passage from the judgment of the Judicial Committee in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen*,[2] in which the principle is laid down that wherever jurisdiction is given to a Court by an Act of Parliament or by a Regulation in India and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is the universal rule that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise. In our opinion this principle does not further the contention of the petitioner and has no application to the facts of the present case. It is obvious that the terms upon which jurisdiction is given to the Magistrate to take proceedings under section 145 have been complied with, inasmuch as the Magistrate was satisfied of a likelihood of a breach of the peace by reason of a dispute relating to land within his territorial jurisdiction. The only question is whether such jurisdiction having been created and raised, he has exercised it the manner prescribed by the Statute. That this distinction is well founded will appear clearly from a closer examination of the circumstances of the case before the Judicial Committee, which turned upon the construction of Bombay Regulation VII of 1827. By that Regulation jurisdiction was conferred upon the Civil Courts to deal with arbitration awards made out of Court, provided the reference to arbitration and the award complied with certain conditions minutely detailed in the Regulation itself. One of these conditions was that the agreement of reference should specify the time for the completion of the award. An agreement of reference to arbitration was made which contravened this condition and specified no time within which the award was to be made. It was held by their Lordships of the Judicial Committee that an award made upon such a reference was not an award which the Civil Court could deal with under the Regulation, because the Civil Court had been given jurisdiction over awards made under a specified condition, and the award in suit was not an award of that description. That was, therefore, a case which stood on an entirely different ground and has no analogy to the case now before us. We are consequently unable to hold that the omission to state the grounds in the initial order makes it an order without jurisdiction so as to invalidate the whole proceedings. It is agued, however, by the learned vakil for the petitioner that, in any event, the omission to state the grounds in the initial order amounts to an illegality sufficient to render null and void the subsequent proceedings, and, in support of this contention, reliance is placed upon the decision of the Judicial Committee in *Subrahmania Ayyar* v. *King-Emperor*[3]. We are unable to hold that the principle of that decision has any application to the circumstances of the case before us. In that case an accused person was charged with forty-one

[1] (1900) I. L. R. 25 Bom. 337. [2] (1855) 6 Moo. I. A 134, 155

[3] (1901) I. L. R. 25 Mad. 61.

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acts extending over a period of two years in contravention of the provisions of section 234 of the Criminal Procedure Code, which provides that a person may be tried at one trial only for three offences of the same kind, if committed within a period of twelve months. Their Lordships, after pointing out the policy which underlies section 234, observed that the disobedience to an express provision of this character, as to the mode of trial, is not a mere irregularity, but an illegality. The decision of their Lordships recognises the distinction between an irregularity and illegality and cannot be treated as an authority for the proposition that non-compliance with every rule of procedure amounts to an illegality sufficient to invalidate the proceedings. Indeed, the Code of Criminal Procedure expressly recognises that such non-compliance may, in some instances, come within the description of error, omission or irregularity. The question, therefore, must necessarily arise when the jurisdiction of a Court is exercised, not strictly in accordance with the mode prescribed by the Statute, whether the defect amounts to an irregularity or illegality; and the answer to the question in any particular case depends upon the object and character of the rule which has been contravened. Now the object of requiring a statement of the grounds in the initial order is obviously to inform the parties, against whom proceedings are instituted, of the reasons which have induced the Magistrate to take action, and thus to enable them to make their defence properly. When, therefore, an initial order has been recorded without a statement of the reasons and has been duly served upon the parties, if they find any difficulty in preparing their defence by reason of this vagueness in the order, it is open to them to apply to the Magistrate for a statement of the ground or to ask him to amend the order. If, however, the parties do not feel any difficulty owing to the omission of the grounds in the initial order, and adduce evidence in support of their respective cases, it is difficult to see upon what principle it can be asserted that the defect in the order is an illegality, which vitiates the whole of the proceedings. It is suggested, indeed, by the learned vakil for the petitioner that, if the initial order is defective, the final order becomes void by reason of section 530, clause (*j*) of the Criminal Procedure Code, which provides that, if any Magistrate, not being empowered by law in this behalf, makes an order under Chapter XII (which includes section 145), his proceedings shall be void. This argument seems to us to be obviously unsound, for, as was pointed out in the case of *Raj Mohan Ray* v. *Prosunno Chandra Chatterji*,[1] section 530, clause (*j*), refers to a case where a Magistrate is not competent, by virtue of the position he holds or powers vested in him, to try a case of the character referred to in section 145. On the whole, therefore, we are inclined to take the view that the omission to state the ground in the initial order does not make the order one without jurisdiction, nor does it amount to an illegality which vitiates the whole proceedings, but such omission is an irregularity for which this Court may be rightly invited to set aside the proceedings, if it is shown that it has operated to the prejudice of any of the parties. This view appears to receive some support from the decision in *Sabid Mondul* v. *Lakshmi Mondul*[2]. It is not suggested in the case now before us that either of the parties was placed at a disadvantage by

[1] (1900) 5 C. W. N. 686. [2] (1902) 7 C. W. N. 599.

reason of any defect or vagueness in the initial order, and we are not prepared to hold that, in a case of this description, the proceedings which appear to be substantially right should be set aside by this Court.

The third and last point which requires consideration is whether, assuming that the initial order is defective and that such defect has affected the jurisdiction of the Magistrate, it is obligatory upon this Court to interfere under section 15 of the Charter. The learned pleader for the petitioner contends that this question ought to be answered in the affirmative, and the cases of *Mohesh Sowar* v. *Narain Bag* [1] and *Nittyanand Roy* v. *Paresh Nath Sen* [2] do appear to lend some support to his argument. If, however, the learned Judges, who decided these cases, intended to lay down any general rule, we regret we are unable to adopt it. Any such general rule, moreover, would be inconsistent with a series of cases in this Court. Thus, the cases of *Drobo Moyee Dabee* v. *Bipin Mundul* [3], and *Shoovankurry Dabee* v. *Dwarka Nath Mookerjee* [4] go to shew that this Court will not exercise its extraordinary powers of interference, under the Charter, unless it is shown that there has been a capital error in the judgment of the Court below, and further that the applicant has entitled himself to the special interference of the Court. This view is consistent with the case of *Jagomohan Lal* v. *Ram Kumar Gope* [5], upon which some reliance was placed by the petitioner. No doubt our discretion must be exercised upon judicial principles; but where the language of the Statute itself is perfectly general, we do not think that our discretion ought to be crystallized, as would be the case, if definite rules were laid down for the exercise of our discretionary power in a particular class of cases. In our opinion the power of superintendence, which this Court possesses under the Charter, should be exercised with regard to all the circumstances of each particular matter, and this judicial discretion ought, as far as practicable, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each individual case. Now, in the case before us, there is no suggestion that either party to the proceedings has been in any way prejudiced by reason of the alleged defect in the initial order. On the other hand, it is suggested with considerable force that, if the proceedings are set aside by this Court and fresh proceedings have to be instituted, the party, who is now the successful litigant, may find himself at a considerable disadvantage, because in a proceeding under section 145 the Magistrate has to determine the question of possession with reference to the circumstances as they exist on the date of the initial order or, in case of forcible dispossession within two months next before such date, he has to determine the question of possession as it existed immediately before dispossession. If, therefore, the party, who has now lost, has gained possession between the date of the initial order and the present time, he will have the benefit of such possession when the next proceedings are commenced. We are convinced that in the present instance, at any rate, the interference of this Court is not demanded in the interests of justice, and in our opinion this Rule ought to be discharged. As, however, we dissent from the view of the law taken in the cases which we

[1] (1900) I. L. R. 27 Calc. 981.
[2] (1905) I. L. R. 32 Calc. 771.
[3] (1868) 10 W. R. 6 (Civ.).
[4] (1876) 25 W. R. 344 (Civ.).
[5] (1901) I. L. R. 28 Calc. 416.

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have discussed at length, under Rule I, Chapter V of the Rules of this Court, we refer this case to a Full Bench and propound the following questions for decision :—

1. Whether an initial order made by a Magistrate under section 145, clause 1 of the Criminal Procedure Code, is defective because it is not self-contained and does not state in express terms the ground upon which he is satisfied that a dispute likely to cause a breach of the peace exists, when such grounds appear in the Police report on which the order is founded and to which it makes reference.

2. Whether, when an initial order made by a Magistrate, under section 145, clause 1 of the Criminal Procedure Code, does not contain a statement of the grounds, such order ought to be treated as made without jurisdiction or as an illegal order, which vitiates the whole of the subsequent proceedings and renders void the final order under clause 6 of that section : or whether such a defective order is an irregularity in the exercise of jurisdiction by the Magistrate, not necessarily vitiating the subsequent proceedings, but justifying the interference of this Court, if it is shown that either party has been prejudiced by reason thereof.

3. Whether, when the interference of this Court is invited under section 15 of the Charter, it is obligatory upon the Court to interfere in any particular class of cases, for instance, where a subordinate Court has made an order without jurisdiction or acted illegally in the exercise of its jurisdiction, or whether the exercise of the discretionary powers of this Court should depend upon all the circumstances of each individual case brought before it.

The following judgments were delivered :—

MACLEAN, C. J.—The first question submitted on this Reference is "whether an initial order made by a Magistrate, under section 145, clause (1) of the Criminal Procedure Code, is defective because it is not self-contained and does not state in express terms the grounds upon which he is satisfied that a dispute likely to cause a breach of the peace exists, when such grounds appear in the Police report on which the order is founded and to which it makes reference." In my opinion, that question ought to be answered in the negative, namely, that it is not defective. The case has been very fully dealt with by the referring Judges, and I do not think I can usefully add anything either to their reasons or their conclusion. I concur in that conclusion. There has, to my mind, been a substantial compliance with sub-section (1) of section 145. No doubt there is a difference of judicial opinion upon the point ; but, on the whole, I think that the view taken in the later cases of *Goluck Chand a Pal* v. *Kali Charan De*[1] and *Dhonput Singh* v. *Chatterput Singh*[2] ought to

[1] (1886) I. L. R. 13 Calc. 175.

[2] (1893) I. L. R. 20 Calc. 513.

prevail. I would, therefore, answer the question, as I have said, in the negative. That being so, the other two questions do not arise.

GHOSE J.—I entirely agree with the judgment which has just been delivered by my Lord the Chief Justice. I would only add that the proceeding drawn up by the Magistrate refers in express terms to the Police report, and the Police report sets out sufficient grounds showing that there was a likelihood of a breach of the peace; and, as I read the proceeding of the Magistrate, it is substantially to the effect that he is satisfied upon such Police report that there is an imminent danger of a breach of the peace. In this view of the matter, I am of opinion that there was a substantial compliance by the Magistrate with the requirements of clause (1), section 145 of the Code of Criminal Procedure.

RAMPINI J. I agree.

PRATT J. I agree.

HENDERSON J. I also agree.

NOTE.

The object of Sec. 145 of the Criminal Procedure Code is to enable a Magistrate, when a breach of the peace is likely to take place in consequence of a dispute regarding any land or water or the boundaries thereof, to settle the matter in dispute temporarily, that is, until the contending parties shall have had their rights determined by a competent Court. See *Krishnakamini* v. *Abdul Jubber* (1902) 30 C. 155, 195, 196 F. B. In re *Pandurung Govind*, the (1900) 25 B. 179, 184. It is not the duty of a Magistrate to determine such *rights* (See Sec. 145 (4) Criminal Procedure Code), but his duty is to find and maintain *actual possession* " without reference to the merits of the claims of any of such parties to a *right* to possess the subject of dispute. (*Ibid*). The proceedings under Section 145 is in reality, a civil one; and the party, who considers himself aggrieved by the order, can come to a Civil Court for redress (*Sukh Lal* v. *Tara Chand Ta*, (1905) 33 C. 68, 79. See also the order of reference in this case) One of the rules of interpretation laid down in this case and referred to in the order of reference is that it cannot be affirmed as a proposition of law of universal application, that non-compliance with any and every provision of the law makes the proceedings a nullity. See 33 C. 352, 359; *Asutosh* v. *Behari Lal*, (1907) 6 C. L. J. 320, 333.

VAITHINATHA PILLAI

v.

THE KING EMPEROR.

[*Reported in L. R. 40 I. A. 193, s. c. 18 C. L. J. 365=17 C. W. N. 1110=15 Bom. L. R. 910.*]

July, 24. The judgment of their Lordships was delivered by

LORD ATKINSON.—The appellant in this case was, by the Additional Sessions Judge of Tanjore, convicted on the 1st of April 1912 of the abetment of the murder of his daughter-in-law named Dhanam, wife of his son Aiyasami, and was sentenced to death. By two orders of the High Court of Judicature at Madras, dated respectively the 19th of June and 5th of August, 1912, this conviction and sentence was confirmed. The two Judges of the High Court before whom the conviction came for confirmation, namely, Bakewell and Sadasiva Aiyar, JJ., differed in opinion. The case was then, under the 378th section of the Code of Criminal Procedure, referred to a third Judge, Sankaran Nair, J. and these orders are practically the orders of Bakewell, J., and the last-named Judge. This appeal has been taken from these latter orders. In the view which their Lordships take of the case it will be quite unnecessary to deal with many of the topics discussed at great length both in the Court of the Sessions Judge and the High Court. For instance, many witnesses were examined to prove that the appellant had some motive to procure the murder of his daughter-in-law which, however inadequate to tempt ordinary human beings to commit such a crime, was quite sufficient to tempt a person such as the appellant, with his views, opinions and passions, to commit it. The motive suggested was in the main this, that the son was greatly under the influence of his wife, the stronger character of the two, and was by her instigated to insist on her husband's right to the partition of certain lands between the members of the family, on the ground that they were the property of a joint Hindu family, while the appellant insisted that he had himself acquired them.

A minor and subsidiary motive was also suggested, which consisted in this, that the father gave an asylum in his house

to a daughter named Thanga Babu—a child widow as she was styled, that is, a girl who had married when she was only ten years old and lost her husband by death before thay had ever lived together as man and wife. Unfortunately this woman had lapsed, or was alleged to have lapsed, from virtue, and the deceased woman, considering apparently that the reputation of the family would be compromised by the presence of the erring one in her father's home, refused to live there unless the sinner was compelled to leave. In order to satisfy these scruples the appellant had sent this woman away, but permitted her to return to him. It was proved that this action caused, as was but natural, feelings of hostility and ill-will to be entertained towards the deceased by Thanga Babu. Both the Sessions Judge and the Judges of the High Court appear to have thought that these facts might well have furnished the appellant with a motive not only strong enough to lead him to procure the murder of his daughter-in-law, but of such overmastering force as to embolden him, to run the risk of killing her in the open reckless manner suggested in the case, in the presence, and with the aid, of four or five accessories, in whose power he would thus absolutely put himself. These learned Judges, it was urged, are well acquainted with, and are the best Judges of, the habits, opinions, and feelings of the race and class to which the appellant and his family belong, as well as of those in the midst of whom they lived. However this may be, their Lordships think it safer, on the whole, to accept, for the purposes of this appeal, the conclusion at which they have arrived on this point. If, however, motive impels so irresistibly persons such as these to the commission of serious crime, it is difficult to see why the enmity existing between Thanga Babu and the deceased, caused as it was, might not also have moved this insulted woman to procure, or aid in, the removal of her enemy by foul means. But however these things may be, and however strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.

Their Lordships desire to abstain, as far as possible, from expressing any opinion upon either the guilt or innocence of any

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of the persons who have been accused of aiding in this murder, or upon the credibility of any witness who was not a witness against the appellant. Their task is to determine whether in the prosecution of the appellant—to use the words of Lord Watson when delivering the judgment of this Board in *Dillet's* case[1], "by some disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and gave injustice has been done." If they come to the conclusion that injustice of that kind has been done, then whatever doubts they may have of the appellant's innocence, or whatever suspicions they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, they think they are bound humbly to advise His Majesty that the conviction should not be allowed to stand.

Their Lordships have come to the conclusion that injustice of the kind mentioned has in this case been done, mainly owing to this, that a vast body of wholly inadmissible evidence, hearsay and other, has been admitted; that when admitted, it has been used to the grave prejudice of the accused; and that at the end of the hearing before the Judge of first instance there did not exist any reliable evidence upon which a capital conviction could be safely or justly based. The fact that their Lordships found their judgment on these points relieves them from the necessity of examining in detail any portions of the voluminous evidence not directly bearing upon them.

The appellant is a wealthy and apparently respectable land holder of good position, living at the village of Pandi, in the Tanjore District of Madras. Aiyasami is the son of his third wife. He was brought up by his paternal uncle, one Sami Thevan, a village Munsif, and was at the time of the trial about 25 or 26 years of age. He is described by the Sessions Judge as dull and weak-minded, and an effort was made to show that from his temperament and character, as well as from some past exhibitions of unprovoked and unreasoning violence, he was a man likly to have an attack of homicidal mania. His wife, the deceased woman, was also a member of a respectable family. She was apparently a resolute and clever woman, about 22 years of

[1] (1887) 12 A. C. 459

age, and had acquired considerable ascendancy over her husband. There were two children of the marriage, both alive, and aged respectively about four and one and a half years. For six or seven years previous to the year 1911 he and she had been living with her relatives in a village in the neighbourhood of Pandi. The father and the son were upon bad terms. At length, by the intervention of friends, a reconciliation was to some extent effected, and Aiyasami, his wife, and two children went on the 13th of September, 1911, to reside in the appellant's house, to see, it was stated, whether they would get on together; one of the terms, however, insisted upon by them was that Thanga Babu should not be permitted to reside in her father's house. It is not disputed that Aiyasami and his wife retired together to rest on the night of the 22nd of October in their father's house, and that she was, during the night and before dawn, murdered with the most brutal and savage ferocity. Thirteen wounds were found to have been inflicted upon her body, all upon the left side, some few slight, but most of them very severe, and many such as could only have been inflicted with some sharp instrument used with very great force. For instance, wound No. 2 was an incised wound an inch long, half an inch wide, and half an inch deep over the left temple. Another, No. 3, a quarter of an inch long, one-eighth inch wide, one-eighth deep just behind the left ear, the lobe of the ear being cut off. No. 4, a cut three inches long, half an inch wide, and half an inch deep on the up part of the neck on the left side, dividing the local blood-vessels in its course. No. 6, a transverse cut three inches long and half an inch wide, extending down to the bone on the left side of the lower jaw, and five or six other wounds of almost equal severity. Such a wound as No. 4 would, according to the evidence of Colonel Hasell Wright, an Army medical officer, examined as a witness, have probably rendered the woman unconscious and unable to talk or walk, as also probably would have wound No. 9. Wound No. 1 would, he thought, probably have stunned her if caused by the weapon called an *aruval*, or bill hook then shown to him, and the fact that the wounds were all transvers would point, in his opinion, to their having been inflicted by one man in the light, not by two men in the dark, while the absence of wounds on the hands of the deceased would indicate that the woman was

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murdered in her sleep rather than while struggling to protect herself.

On the 23rd of October, 1911, the day after the murder, an inquest was held upon her body and a verdict returned by the jury that Aiyasami Pillai, her husband, had murdered her with a blood-stained *aruval* then produced to them. This weapon had been found in the place where the deceased woman had slept, had been taken possession of by the police, and was produced at the inquest. On the 22nd of November, 1911, Aiyasami Pillai was brought before the Second Class Magistrate at Tiruturaipandi in the Tanjore district, charged with the murder of his wife, with the view apparently of his being returned for trial for the crime. The depositions of several witnesses, including that of an old woman, Mutachi, his grand-mother, then an inmate of the house, were taken. She deposed that during the night she heard a noise like a thud, got up, went to where Aiyasami was sleeping, found him sitting on a cot on the right side of the bed and cutting his wife with an *aruval* ; that she said to him "Boy, what do you cut ?" and cried out, "He has killed, he has killed," that the baby then sleeping in the cot woke up, and that there was blood but no wounds upon it. The Magistrate, instead of returning the accused for trial, stated he disbelieved the evidence against him, admitted him to bail, and next day, the 28th, discharged him from custody. In delivering judgment he said "The defence theory is not completely before me. It goes to show that the deceased was obnoxious to the accused Thanga Babu, and she, Thanga Babu, decoyed her into the cattle shed, or back yard, and gave her into the hands of the accused's father and satellites, who brutally killed her, and laid her out in her bed and forcibly put a bloody cloth on the accused and accused him of murder." According to the defence the murder took place about midnight. The Magistrate wound up by saying that "All these circumstances point the suspicion against the accused's father, step-sister, step-brother Kalyanam, the servant Kathiresan, and others. This will be further investigated." Aiyasami was the only person who had been charged. There is no proof that the defence to which the Magistrate refers as put forward on his behalf was not put forward at his instigation or with his concurrence. It differs in every particular from the account subsequently deposed to by him. This Magistrate had no doubt

jurisdiction to take the course he actually took, but the discharge is not an acquittal. Aiyasami might have been tried again; he, to use the words of the Sessional Judge, "was not safe," at the time of the subsequent trial, and one of the results of his discharge under the circumstances was necessarily this, that he was subjected up to and during the trial to a tremendous temptation to endeavour to put the halter round his father's neck in order to save his own. That circumstance can never be lost sight of in estimating the value to be attached to the evidence he subsequently gave.

On the 27th November, the day previous to the delivery of this pronouncement, this same Magistrate had ordered the arrest of Thanga Babu, Kathiresan the appellant's servant, and Kalyanam, his son.

On the 2nd of December, the appellant's wife, Kanthimati Achi, and Avani Konan were also arrested. Ultimately every inmate of the appellant's house was arrested, with the consequence that their mouths were closed, since, though accused persons may make a statement, and the Judge or Magistrate may put questions to them, they cannot be examined as witnesses on their own behalf. On the 27th October the second class Magistrate of Tituraipandi took from Aiyasami a statement, not on oath, which was ultimately put in evidence by the prosecuting counsel at the trial in corroboration, it was said, of the former's evidence, although it is in many respects inconsistent with it. It is printed at page 115 of the Record. In it he states that he, his son (the baby), and his wife, the deceased, had gone to bed, that his wife lay with her head northwards, the child in the middle, and he on the eastern side; that Kanthimati Achi, the wife of the accused, Thanga Babu, his sister, and Kalyanam, his brother, were pressing down his wife; that his father, the appellant, cut her with one stroke; that he went near his father and said "don't cut, leave off," and that the blood spurted on a red cloth he was wearing at the time, and stained it; that his father and brother Kalyanam said; "You catch hold of that fellow, and keep him," that thereupon the two servants Kathiresan and Avani, and one Somu, the son of an employé or agent of the appellant, caught hold of him and kept him; that ten or fifteen minutes after he was caught hold of and thus kept, they all came out to where he was; that

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while he was kept under restraint the noise continued to be heard, and that at dawn he went and saw that other cuts had been inflicted on his wife. This, having regard to what followed, is in many respects a most important statement. *First*, it was proved in the case and was admitted in argument before their Lordships that the statement that at the time his wife was murdered he was wearing this red loincloth was untrue. It was proved to be his cloth, but it was also proved that the cloth he wore the night his wife was murdered was a white cloth. *Secondly*, he does not state that a man Thiagan was present on the occasion of the murder or took any part in the proceedings. *Thirdly* he made no suggestion that his wife was removed from the room where she lay before she was killed. On the contrary, the fair meaning of his words would rather appear to be that she was murdered where she lay. Well on the 6th of December, 1911, this Thiagan was arrested by, as appears from exhibit "G," p. 143, Detective-Inspector D. S. Krishnasami Ayar, and next day brought before this same Magistrate. He was kept in custody, and on the 28th of that month the Magistrate writes to his superior officer I. T. Gillespie, exhibit 23, p. 170, to announce that Thiagan had made a full confession implicating the appellant and the other prisoners, corroborating the evidence given by Saminatha Pillai in the previous enquiry, and implicating the informant himself. On the 14th of December following a statement was taken from this man by V. S. Narayan Row, a second class Magistrate, and he was subsequently, on the 18th of March, 1912, examined as a witness at the trial. The story told in the confession is strange and revolting. He brings upon the scene his brother Somu as well as himself, all or almost all of the inmates of the appellant's household, and two unnamed strangers unknown to him. He represents that he himself, his brother Somu, Kathiresan, and Avani, the two servants, by the orders of the appellant took away Aiyasami to a second compartment and tied him there Avani being left in charge with directions, given by the appellant, to hack him if he talked. That Somu, Kathiresan, and himself then returned to where deceased was, that the appellant's wife Kanthemati pressed down the shoulders of the deceased, that Kalyanam, the son, closed her mouth, that by the appellant's directions Kalyanam and Kathiresan lifted the woman by the head side, he and Somu by the feet, and, conducted by the

appellant, and followed, with a light, by Thanga Babu, carried her into the cow-shed, and laid her down at the foot of an orange tree; that the two unknown men were standing there; that the appellant then said to these men "do your business," that thereupon one of them, coming to the right side, cut the deceased between the ear and the right shoulder with an *aruval*, that the appellant then addressed these nameless men, saying, "you men despatch the business soon," and thereupon the men proceeded to hack the deceased to death, that subsequently the appellant said to him, there is a dyed cloth; take it. Aiyasami is now wearing on his waist a white cloth; take it off and dress him with this dyed cloth," and that he, Thiagan, subsequently did so. This last statement, it will be observed, is in direct contradiction to the statement made by Aiyasami on the 27th of October, already referred to, who, when asked to explain how bloodstains had got on the red dyed loin cloth taken from him, replied that when his father (the appellant) cut the deceased with one stroke her blood spurted out upon it.

This man was on the 18th of March examined as a witness. He stated he did not see the appellant the night of the murder, that he did not go to his house that night, that Mutachi had told him Aiyasami had cut his wife, and that he did not see anyone cutting her. He was thereupon, by the permission of the Court, cross-examined by the Public Prosecutor.

The cross-examination ran as follows:

(By permission of Court, cross-examined by Public Prosecutor).

Q.—Were you examined by the Nidamangalam Sub-Magistrate?

A.—Yes.

Q.—Did he record what you said?

A.—I deposed before him as I was tutored by the police.

Q.—Did you tell him that?

A.—I was asked by the police not to say so.

Q.—Did you tell the Magistrate the truth?

A.—I told him what the police told me.

Q.—Was it the truth?

A.—The only truth is what I have said Mutachi told.

Q.—Did you tell the Sub-Magistrate what Mutachi told you?

A.—I did not, as I was asked by the police not to say so.

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Q.—Everything that you told the Sub-Magistrate was false?

A.—I told him what I was asked to say. I was asked to speak falsely and I spoke falsely.

These being his replies, his confession (Exhibit "O") was read over and filed as evidence. Next day, on being brought into Court, still in custody, he volunteered that on the day before, when he saw the Court and people, he was afraid, and that he now wished to speak the truth. But he was never asked either by the Court or Counsel on either side, to name the officer or officers of the police who asked him to give false evidence. The officer who arrested him was not produced, nor was any witness produced by whose cross-examination the defence would have had an opportunity of ascertaining at whose instance he was arrested, or how this confession came to be made, or what inducements, if any, were held out to him to make it. Everything connected with it was, as far as the appellant was concerned, done in the dark. And Sir Robert Finlay, who opened this appeal, complained bitterly, and, in their Lordships' view, not without reason, of the great injustice done to the accused by the adoption of such a course of procedure. The Sessions Judge most naturally and rightly came to the conclusion (p. 188) that it would be unsafe to accept any portion of the approver's story without independent corroboration. Mr. Justice Bakewell thought that no reliance could be placed upon it. And the third learned Judge who heard the case said (p. 233) that the informer's evidence was not relied upon before him. Sir Erle Richards, quite rightly, in their Lordships' view, early in the argument, stated he did not intend to rely upon it. This evidence may therefore be taken as struck out of the record, but though struck out, it leaves its taint behind it, and reflects back upon the evidence of Aiyasami, the only other witness who gives direct testimony as to the commission of the crime by the appellant, for this, amongst other reasons, that on the 18th of January, 1912, three weeks after the informer's confession had been taken, Aiyasami had himself made a deposition, evidently designed and intended to corroborate the informer's story. In it he brings upon the scene the informer, whom before that he had never mentioned as having been present.

The statement that the informer had tied the red cloth round him after all was over conforms with latter's story though

it is in conflict with his own previous account, and the further statement that he had been tied to a pillar, never made before, was obviously introduced for the same purpose. The stories told by both these men are thus designedly made to harmonize and fit into each other. When one story is rejected as incredible the reliability of the other is necessarily affected. He (Aiyasami) was examined as a witness at the trial on the 21st March, 1912. He then stated that his statement given to the Magistrate G. S. Vaikhinathar Ayar on the 27th of October, 1911 was not true; that the Inspector Krishna Ayar "troubled" him to make it, that he saw this Inspector in the gaol seven or eight times before he made it. In cross-examination he said that he told the Magistrate he lay with his head to the north, because the Sub-Inspector told him to say so; that the Sub-Inspector said it would be a good thing for him to say that, but that he did not mention why, that it was not true that he was lying on the east side of his wife. He further said it was false that his father cut his wife with one stroke, that the Inspector told him to say so, that he told the Sub-Magistrate that he had omitted the name of the informer in his statement made on the 27th of October 1911 (Exhibit S), because the Sub-Inspector had asked him to do so, that he had told the Magistrate that the Sub-Inspector had told him to suppress Thiagan's name, but did not ask him to suppress Somu's name. He further stated that it was the Sub-Inspector who told him to say that he saw his father cut his wife, and also to say that the murder was on the cot in the room. He admitted that he had denied to the Sub-Magistrare the statement that the Sub-Inspector had told him to mention the name of the person who killed his wife, but that he did this at the dictation of the Sub-Inspector. Several charges of less importance were made by the witness against this Sub-Inspector and this Sub-Magistrate. These latter were examined as witnesses and denied them all. If true they show that these officials or at least the Sub-Inspector induced the witness to forswear himself, and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father, and, if false, they show that the witness was ready to commit, and did commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements.

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There is no alternative. Forgetfulness is, their Lordships think, out of the question, and no confusion produced by the most skilful cross-examination can account for statements which must either be the witness's own inventions, or the inventions of others repeated by him with knowledge of their character. In either event their Lordships are clearly of opinion that this witness's evidence is wholly unreliable, and should be disregarded as completely as that of the informer.

The learned Sessions Judge appears himself to have taken a similar view of this man's evidence, at least to a large extent. When referring to it, at page 188, he said :—" But though I do not wish to apply a meticulous standard to his evidence I do not think it will bear the test of examination." And so fully does he appear to have been convinced of this that he acquitted and ordered to be discharged three of the persons whom Aiyasami had expressly charged with being active aiders and abettors in the murder.

Sir Erle Richards urged upon their Lordships the danger of disturbing the verdicts of Judges in criminal Courts in India, who, having seen and heard the witnesses, had believed them, and founded their decision upon their testimony. Their Lordships are fully alive to those considerations. But this is emphatically not a case of that character. It is precisely the reverse of that. Here the Judge who heard and saw the witness did not think his evidence so reliable that he could act upon it alone.

If he had thought it relible he could not have ordered the discharge of the three prisoners implicated by it. His statement is very explicit (page 200) : " I do not think that there is sufficient evidence to establish beyond doubt how or where the murder was actually committed, or that either Kathiresan or Avani or Thanga Babu assisted in it, though it is highly probable that the former were amongst the agents employed by the first accused. I therefore acquit them and discharge them."

The learned Sessions Judge based his conviction of the appellant on five specific findings, as he styles them. These are all stated by him at bottom of page 199, and top of page 200 of the Record, and are as follows : 1. That the murder must have been committed by some of the inmates of the appellant's house

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that night. 2. That the clothes, *i.e.*, the two loin cloths which were spotted with blood, afforded conclusive proof that more than one man assisted in the murder. 3. That the account given by the appellant and his mother-in-law (*i.e.*, Mutachi) were demonstrably inconsistent with facts. 4. That the appellant's conduct after the murder indicated a guilty conscience. 5. That he was the only one of the inmates of the house who is proved to have had any motive to murder Dhanam.

Their Lordships do not think that this last conclusion necessarily follows from the evidence. As to the first, if the learned Sessions Judge had said that the murder must have been committed either by or with the connivance or assistance of some of the inmates of the appellant's house, their Lordships would be inclined to concur with him. The second finding is, they think, a *nonsequitur*. It assumes that the two cloths, both of which belonged to Aiyasami, could not have been worn by him at two different stages in this outrage, and must at the time of the murder have been worn by two different men. But Aiyasami never said so; on the contrary he first stated he had worn the red one at the time of the murder, and that his wife's blood spurted on to it when his father cut her with one stroke. Then he swore that he wore the white cloth on that night, and that the red one was put on him by the approver by his father's directions. This theory is in direct variance with every one of Aiyasami's statements. If the cloth not worn at the time the murder was committed was in the compartment where the deceased and her husband slept it may well have got her blood upon it, much of which must have been shed. If he changed his cloths after the murder the second might well have got stained in this room. There is no evidence where the clothes not in use were kept. If in the room where the murder was committed they might well have been stained with spots of blood as they have been found to be, and, besides, spots of blood might have got on one of them from other sources. Moreover the proof, as is usual in such cases, only established that the blood was mammalian blood.

As to the third finding their Lordships would quite concur with the Sessions Judge if it is to be assumed that the story told by the informer and Aiyasami is true, but they fail to find anything in these accounts to show they are demonstrably

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inconsistent with the facts on any other assumption. The fourth finding opens up a wide field. A large body of inadmissable evidence, hearsay and other, was admitted, some unimportant in bearing and effect, some very prejudicial to the accused. Statements made in the absence of all the accused, such as the conversation between Sami Thevan and Aiyasami, in which the latter was urged to say nothing about the murder and to compromise with his father, and statements made in the absence of some of the accused but in the presence of others were lumped together and used, *in globo*, apparently, against all. But this finding is based in the main upon a piece of evidence which was utterly inadmissible, and which, when admitted, was pressed home by the prosecution against the accused with great effect, and, as is evident from the judgments, wrought the greatest injustice. It is this, messengers were sent not by the accused, but by a friend, to announce the death of the deceased to some friends and acquaintances of the family in another village. These messengers told some persons to whom they spoke that the deceased woman had died of cholera. The rumour spread. The person who sent the messengers was sworn and examined. He denied that the had ever instructed them to make such a statement. Not a particle of evidence was adduced to show that the appellant had himself instructed these messengers to make this statement, or directly or indirectly ever authorised anyone to make it for him or on his behalf or that he knew anything about it. Yet, without the foundation for admitting these statements ever having been laid, they were admitted in evidence, and because the bodies of persons who die of cholera in India are almost immediately cremated to avoid the spread of infection, were relied upon by the prosecution and accepted by some of the Judges who considered this case, as clear and convincing proofs of the appallant's consciousness of guilt, and of his desire (in one instance it is styled an attempt) to destroy the evidence of his crime.

It appears to their Lordships that a grave and substantial injustice was done to the appellant in admitting and thus using this piece of inadmissible evidence. The two other matters relied upon as proofs of the accused's guilty conscience are first a conversation about the cremation of the remains, the ordinary

way of disposing of the bodies of dead Hindus in India, which was perfectly innocent on its face, and may well have had reference to nothing more than the funeral which was to take place in due course. The rumour of the death by cholera was permitted to reflect back, however on this simple incident, and in the eyes of the Sessions Judge gave to it a guilty complexion. In their Lordships' view this piece of evidence gives no support whatever to the fourth finding. The other incident relied upon to support the finding is this : Sami Thevan, the village Munsiff, who entertained no friendly feeling towards the appellant, was sent for before 6 o'clock in the morning. He arrived at the appellant's house about 6 a. m. He was shown the body of the deceased, saw Aiyasami and took a statement from the appellant, and gave it to the police five or six days later, but the police were not communicated with for some hours, and did not arrive on the scene till about 11 o'clock. It was contended that the room in which the deceased slept had by that time been arranged, and the body of the deceased placed in a position it could not have occupied at the time of the murder. This may well be, but many people had access to the room as well as the appellant.

There is no evidence that he himself did, or procured to be done to the body any of these things. The matter specially pressed against him is the tardiness of the communication with the police. Their Lordships think that in this case that is rather a negative circumstance. Whether the father himself committed the murder or the son committed it, eagerness to communicate with the police could not well be expected from him. The following passage from the judgment of the Sessions Judge deserves attention. It runs thus (p. 200): "On these findings (the five preceding) I convict first accused (*i.e.*, the appellant), Vaithinatha Pillai, of abetment of murder punishable under section 302 read with either 109 or 114, Indian Penal Code, since he is said to be physically incapable of having inflicted the injuries with his own hand." Lieut.-Colonel Wright had deposed that wound No. 4 would probably have rendered the woman unconscious, that it might have been inflicted with a weapon such as the *aruval* shown to him, but that he had examined the appellant, that he had a badly united fracture of the bone of the right fore-arm, and that his hand

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was more or less deformed, and that, considering the state of his right arm, he could not have inflicted this wound.

What their Lordships presume the learned Sessions Judge meant by this paragraph is this, that the appellant did not himself inflict the blows, but of course if the case against him has any truth in it, he was a principal.

The facts so found by the Sessions Judge furnish in his view the corroboration of the evidence of Aiyasami which rendered it reliable as against his father, though unreliable against the other three persons accused. In their Lordships' view, the inferences which the Sessions Judge has drawn from the evidence and embodied in these findings cannot reasonably be drawn from it. They think that the evidence reasonably interpreted affords no corroboration at all of Aiyasami's story. The so-called circumstantial evidence in their opinion in no way strengthens the direct evidence, which, as already stated, cannot be relied upon, and for these with the other reasons already mentioned, they think that the conviction of the accused should not be allowed to stand. And they have humbly advised His Majesty accordingly.

T. L. Wilson & Co.—Solicitors for the appellant.

The Solicitor, India Office.—Solicitor for the Respondent.

Appeal allowed.

NOTE.

In this case special leave to appeal to the Privy Council was asked for and granted. Special leave is necessary because though there is a prerogative right in the crown to entertain an appeal in Criminal Cases, there is no absolute right of appeal to the Privy Council inherent in the person convicted, and the Privy Council will only entertain such an appeal upon the certificate of the High Court or in very exceptional cases. See *Reg* v. *Joykissen Mookerjee* (1862), 1 M. P. C. (N. S.) 272, s. c. 9, M. I. A. 168=1 W. R. P. C. 13, and Letters Patent, (1865) for the High Court of Judicature at Fort William in Bengal, clause 41. "Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done" per Lord Watson in *In re Abraham Mallory Dillet* (1887), 12 A. C. 459, 467; cited during the argument of Vaithinatha's appeal and also in *Balgangadhar* v. *R.* (1897), 22 B. 528, (where leave to appeal was refused); *Subrahmania Ayyar* v. *R.* (1901), 25 M. 61. *Ex parte Macrea* (1893) 20, I. A. 90, (leave to appeal refused). *Channing*

Arnold v. *King Emperor* (1914), 41 I. A. 149, s. c. 41 C. 1023 P. C.=18 C. W. N. 785=20 C. L. J. 161 For discussion on the topic of the special position and function of the Judicial Committee, in Criminal Cases as the advisers of the King-Emperor see *Channing Arnold* v. *King-Emperor* (1914), 41 I. A. 149, 171—175, 41 C. 1023, 1065—1071, s. c. 20 C. L. J. at pp. 178—182. In *Arnold's* case their Lordships pointed out that *Dillet's* case was in form an application within the ambit of Criminal Law, but the matter of substance which was truly brought before the Judicial Committee was a civil matter. Their Lordships interpreted the words of Lord Watson in Dillet's case quoted above and discussed the case of *Vaithinatha Pillai* v. *King-Emperor* in 41 I. A. p. 174 s. c. 41 C. 1069, 1070. Section 167 of the Indian Evidence Act, should be read carefully in connection with *Vaithinatha's* case.

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[*Reported in I.L.R. 42 Cal. 957, 981—1028 s.c. 21 C.L.J. 331, 343—376 = 19 C.W.N. 677, 685—706.*]

MOOKERJEE J. * * * * * * * *

It has been argued in the third place that the conspiracy charge under section 120-B, Indian Penal Code, is bad, inasmuch as it assigns a wrong date for the commencement of the period during which the conspiracy charged against the accused lasted. The charge specified the period as contained between March, 1911, and the 21st November, 1913. It is pointed out that sections 120-A and 120-B did not find a place in the Indian Penal Code before the 27th March, 1913, when Act VIII of 1913 became law. It is obvious that the period should have been restricted between the dates 27th March and 21st November, 1913. Under section 222 (1). Criminal Procedure Code, particulars as to the time of the alleged offence were necessary and the prosecution should have been careful in this respect. No objection to the charge on this ground was, however, taken at the trial till a very late stage of the proceedings, in fact only in the course of the final arguments, and the error cannot be deemed to have affected the legality of the trial. No doubt the accused cannot be convicted unless the prosecution establishes that the accused were members of the conspiracy after the 27th March, 1913, but this involves an investigation of the merits of the case. The third ground thus turns out to be unsubstantial and must be overruled.

In the fourth place, the legality of the trial has been questioned on the ground of misjoinder of charges. The substance of the argument is that while four of the accused persons are charged with an offence under section 4 (*b*) of Act VI of 1908, all the six accused are charged with conspiracy under section 120-B, Indian Penal Code, and it is contended that a joint trial of all these persons for the two offences charged is illegal, on the authority of the decision of the Judicial Committee in *Subrahmania* v. *King-Emperor* [1]. It cannot be disputed

[1] (1901) I. L. R. 25 Mad. 61 ; L. R. 28 I. A. 257.

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that if misjoinder of charges is established the trial must be deemed illegal because held contrary to an express provision of the law relating to the mode of trial. The real question in controversy is whether there has been a misjoinder of charges in the case before us. On behalf of the accused, it has been contended that the same individual cannot be simultaneously charged with an offence as also with conspiracy to commit that offence, and much less can he be tried jointly with other persons alleged to be his co-conspirators. In support of this view, reliance has been placed upon *King-Emperor* v. *Tirumal* [1]. This decision is however of no real assistance to the accused; it is an authority only for the proposition that a man cannot be cumulatively charged with the commission of an offence, as also of abetment by conspiracy or otherwise of the very same offence; it is besides, a decision given before Section 120-B Indian Penal Code, was enacted. In our opinion the legality of the trial in the present case must be determined with reference to the language of Section 239 of the Criminal Procedure Code, which so far as it is relevant to the question before us, is in these terms:—"When more persons than one are accused of different offences committed in the same transaction, they may be charged or tried together or separately as the Court thinks fit." No useful purpose would be served by an elaborate examination of the judicial decisions in which the expression "same transaction" has been interpreted, although reference has been made at the Bar to many of the recent cases on the point: *Queen-Empress* v. *Fakirapa* [2], *Emperor* v. *Sherufalli* [3], *Emperor* v. *Jethalal* [4], *Emperor* v. *Datto Hanmant* [5], *Emperor* v. *Hari Raot* [6], *Emperor* v. *Ganesh Narayan* [7], *Nga Tha Gye* v. *Emperor* [8], *Ishar Das* v. *Emperor* [9], *Emperor* v. *Ghulam* [10], *Pulinbehary Das* v. *Emperor* [11] and *Choragudi* v. *Emperor* [12]. It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but

[1] (1901) I. L. R. 24 Mad. 523, 547.
[2] (1896) I. L. R. 15 Bom. 491.
[3] (1902) I. L. R. 27 Bom. 135.
[4] (1905) I. L. R. 29 Bom. 449.
[5] (1905) I. L. R. 30 Bom. 49.
[6] (1906) 4 Cr. L. J. 420.
[7] (1912) 14 Bom. L. R. 972; 13 Cr. L. J. 833.
[8] (1912) 13 Cr. L. J. 485.
[9] (1908) 8 Cr. L. J. 75.
[10] (1908) 8 Cr. L. J. 191.
[11] (1912) 15 C. L J. 517, 582.
[12] (1910) I. L. R. 33 Mad. 502.

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circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. To take one illustration: A and B conspire to cheat X; in pursuance of that conspiracy and in fulfilment of its object, A cheats X on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by A and B and the offence of cheating committed by A alone, have been committed in the same transaction. This view is in accord with that adopted in two recent decisions of this Court, from which we see no reason to dissent in this respect: *The Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Manmohan Ray* [1] and *Harsha Nath Chatterjee and Others* v. *Emperor* [2]. We hold accordingly that if A, B and C conspire to make or have in their possession or under their control an explosive substance within the meaning of the Explosive Substances Act and if in pursuance of such conspiracy, A makes or has in his possession or under his control an explosive substance they may, if the Court thinks fit, be charged and tried together under Section 120-B, Indian Penal Code, and Section 4 (*b*) of Act VI of 1908. The fourth ground must accordingly be overruled as unsustainable.

The fifth ground on which the legality of the trial is questioned is that persons who are alleged to be conspirators in the charge have not been prosecuted, although their names and addresses were known to the prosecution. Reference has in this connection been made to *Emperor* v. *Lalit Mohun* [3], where it was ruled by Jenkins, C.J., that in a conspiracy case the accused can be charged with conspiracy with persons unknown, but that if they are charged with conspiracy with persons known, then such persons must be named in the charge. It is not necessary for our present purpose to determine whether the rule so stated is not too widely formulated, but it may be observed that a different view has sometimes been maintained. Thus in *Stoddart* v. *R.* [4], the legality of a conviction for conspiracy was questioned on the ground that though the prosecution knew that one

[1] (1914) 21 C. L. J. 195.
[2] (1914) 21 C. L. J. 201.
[3] (1911) I. L. R. 38 Calc. 559; 15 C. W. N. 98.
[4] (1909) 2 Cr. Ap. R. 217, 224, 237.

Klinge was an alleged conspirator, he was not named in the indictment. In support of this objection, reliance was placed on *Rex* v. *Walker* [1]; *The Queen* v. *Thompson* [2], and *R.* v. *Robinson* [3]; but it was overruled by the Court of Criminal Appeal. That judicial opinion on the point has not been quite uniform is obvious from an examination of the cases mentioned, as also *R.* v. *Deakin* [4], *R.* v. *Campbell* [5], *R.* v. *Stroud* [6], *R.* v. *Caspar* [7], *Rex* v. *Bush* [8], R. v. *Esdaile* [9], 1 Chitty on Criminal Law, 213; Russell on Crimes (1909), 186, 187, 1292, 1478. The question has also been the subject of elaborate discussion in the Courts of the United States. In *People* v. *Mather* [10], the charge of the indictment was of a conspiracy to abduct William Morgan who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone, and the charge of the indictment was that Mather with "other persons unknown" had conspired, etc., although it was a fact that many of the other persons were well-known. The Court held, on the authority of *R* v. *Herne* [11], mentioned in the case of *Rex* v. *Kinnersley and Moore* [12] and *Anon* [13], that the indictment against Mather alone was good; there was a conviction and a new trial was denied. Marcy J., observed: "in a charge of conspiracy, it seems no more necessary to specify the names of the defendant's co-adjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the traspass." The view thus taken in *People* v. *Mather* [10], was approved in *People* v. *Richards* [14] and *United States* v. *Miller* [15]. Let us assume, however, that the strict rule formulated in *Emperor* v. *Lalit Mohan* [16], is well-founded on principle and is supported by balance of authorities: that rule is clearly of no assistance to the accused in this case. That decision does not show that if all

[1] (1812) 3 Camp. 264.
[2] (1851) 16 Q. B. 832.
[3] (1817) Holt 595.
[4] (1800) 2 Leach 862.
[5] (1843) 1 C. & K. 82.
[6] (1842) 1 C. & K. 187; 2 Moody 270.
[7] (1839) 2 Moody 101; 9 C. & P. 289.
[8] (1818) Russ. & R. 372.
[9] (1858) 1 F. & F. 213; 2 East P. C. 651, 781.
[10] (1830) 4 Wendell N. Y. 229; 21 Am. Dec. 162.
[11] (1709) Unreported.
[12] (1719) 1 Strange 193.
[13] (1635) Cro. Car. 380.
[14] (1885) 67 Cal. 412; 56 Am. Rep. 722.
[15] (1878) 3 Hughes 553; 26 Fed. Cas. 1255.
[16] (1911) I. L. R. 38 Calc. 559; 15 C. W. N. 98.

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the known co-conspirators named in the charge are not placed on their trial, the trial of some without the others is vitiated. It is indeed open to the Court to place the co-conspirators on their trial separately: *Rex* v. *Kinnersley and Moore*[1], *The King* v. *Oxford*[2], *R.* v. *Nichols*[3], *R.* v. *Ahearne*[4], *People* v. *Richards*[5], *United States* v. *Miller*[6], Russell on Crimes (1909) 149, 180, 3 Chitty on Criminal Law, 1141, Bishop on New Criminal Procedure, Volume 1, section 464, 1022, Volume 11, section 225; McClain on Criminal Law, Volume 11, section 981. This might in certain circumstances, be an obvious advantage to the persons actually placed on trial; they would be at liberty, if they so desired, to call the alleged co-conspirators as witnesses, a course which could not possibly be adopted, if all the co-conspirators were tried jointly. But it has been argued that if persons are allowed to be named as co-conspirators in the charge and are yet not placed on their trial, there may be an inducement to the prosecution to mention the names of persons as co-conspirators indiscriminately, with a view to let in evidence under Section 10 of the Indian Evidence Act, which would otherwise be inadmissible. This apprehension is, in our opinion, groundless, for whenever evidence is attempted to be made admissible under that section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together. We are unable to hold accordingly that the omission of the prosecution to proceed against the alleged conspirators in this case has vitiated the trial of the other persons. The fifth ground, consequently, fails.

The sixth ground on which the legality of the trial has been assailed is that facts disclosed, if believed, indicate that the accused have committed an offence punishable under Section 121-A, Indian Penal Code, and should have been tried accordingly. The contention in substance is that the prosecution has been commenced under section 120-B, Indian Penal Code, and section 4(*b*) of Act VI of 1908 with a view to evade the requirements of section 196 of the Criminal Procedure Code, compliance

[1] (1719) I Strange 193.
[2] (1811) 13 East 411.
[3] (1742) 13 East 412n.
[4] (1852) 2 Ir. C. L. 381; 6 Cox 6.
[5] (1885) 67 Cal. 412; 56 Am. Rep. 772.
[6] (1878) 3 Hughes 553.

wherewith, as was ruled in *Barindra Kumar Ghose* v. *Emperor*[1], is imperative in prosecutions for offences against the State. In our opinion, there is no basis for this contention. No doubt evidence has been adduced on behalf of the prosecution to show that revolutionary literature was in possession of some of the accused persons; no foundation, however, has been laid to establish that the accused had conspired to commit an offence punishable under section 121-A, Indian Penal Code. But even if it be assumed that the accused could have been successfully prosecuted under section 121-A, it does not follow that it was obligatory upon the Crown to prosecute them under that section. If the accused have committed an offence under section 4(*b*) of the Explosive Substances Act 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences irrespective of the question of the ultimate design of the alleged conspiracy. On the other hand, the accused might legitimately contend that the trial should proceed strictly on the lines of the charges framed, and that evidence, such as would have been appropriate to support a charge under section 121-A, should not be admitted in the disguise of evidence in support of a prosecution under section 120-B. The sixth ground must thus be overruled as untenable. We shall now proceed to examine the merits of the case.

The fundamental question on the merits, which has led to protracted discussion in this Court as in the Court below, relates to the true nature of Exhibits I, V, VI and VII. On behalf of the prosecution, the view has been maintained that these exhibits constitute materials for the preparation of bombs, while on behalf of the accused the theory has been vigorously supported that these articles were used by Sasanka in experiments towards the construction of a cheap acetylene generator. In support of their position, the prosecution have adduced in evidence specimens of bombs, exploded and unexploded, for instance the Dalhousie Square bomb, dated the 2nd March, 1911, the Midnapore bomb, dated the 13th December, 1912, the Delhi bomb, thrown at the Viceroy on the 23rd December, 1912, the Moulvi Bazar bomb, dated the 27th March, 1913, the Lahore bomb, dated the 17th May, 1913, the Mymensingh bomb, dated the 30th September, 1913, and the Bhadreshwar bomb, dated the

[1] (1909) I. L. R. 37 Calc. 467; 14 C. W. N. 1114.

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-31st December, 1913. Of these, the bombs mentioned first and last did not explode and are practically intact, although the explosive substances contained therein have been removed; all the other bombs exploded and caused destruction of life. The bombs which have been exhibited are obviously all of the same type, and there is expert testimony to this effect. Colonel Muspratt Williams says that the design of these bombs is the work of one controlling mind not that they had necessarily been made by one man. He adds that he had never met with a bomb of a similar construction before his examination of the series of bombs exhibited in this case. Major Turner says that the series of bombs from Dalhousie Square to Bhadreshwar all belong to the same family and that he had never before come across this kind of bomb. The system adopted appears to have been to use, for the shell of the bomb, a tin of the kind in which tobacco cigarettes or condensed milk is sold, and with it to use iron discs and iron clamps. Exhibit 1 is made up of a similar tin, similar discs and similar clamps. Exhibits V and VI taken together make up another complete shell of a bomb, which consists of a tin case with three discs and four clamps. The total find aggregates to 2 tins, 11 discs, 8 completed clamps and several others in various stages of preparation. The similarity of these articles to the tins, discs, and clamps actually used in the boms exhibited is remarkable and is calculated to strike the intelligent observer, without the aid of expert testimony. Two points of difference, however, have been emphasised on behalf of the defence. It has been argued, in the first place, that whereas the discs found in the room of Sasanka were made of ordinary iron, the discs used in the bombs exhibited were, in some instances at least, made of galvanised iron. With reference to this circumstance, it has been contended that discs so made could not be used for the purpose of a bomb, as an explosion would take place as soon as the discs came into contact with picric acid. The obvious answer is that, as in the case of the bombs exhibited, these discs, before they could be used in an actual bomb, would have to be lacquered, and lacquer was in fact found in the room. It may also be pointed out that the inner surface of the tin case itself should for safety be protected in the same way as the discs, to avoid the formation of picrate of tin which, according to Colonel

Muspratt-Williams, is a highly sensitive substance. In the second place, it has been argued that as there is a slight difference in the thickness of the iron used for the discs and clamps found in the room and those used in some of the actual bombs exhibited, the articles suspected could not have been intended for use in the construction of a bomb. There is no force in this contention, for as Major Turner says in spite of the fact that some of the parts are lighter, the principle remains the same. After careful examination of the tin cases, discs and clamps found in the room and a comparison therewith of the corresponding parts of actual bombs, we have arrived at the same conclusion as the Sessions Judge, namely, that these articles found in possession of Sasanka were suitable for use as bomb shells. This leads us to the question whether they could have been intended for innocent use. This enquiry is essential, because it is an elementary rule that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As Anderson B. says in *R.* v. *Hodge* [1], to enable the Jury to bring in a verdict of guilty, it is necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw, what then, is the reasonable hypothesis which has been offered as an explanation of the articles found in possession of Sasanka ? The theory he puts forward for acceptance is that at the suggestion of one Jogendranath Dutt, he was engaged in experiments for the manufacture of a simple and cheap acetylene gas lamp which could be used as a substitute for the native *kupies*, and that Exhibit I was only a part of the generator made by him under instruction for Jogendranath Datta, to whom were due the details of the lamp, namely, the tin, discs, clamps and general construction. The theory, however, is not consistent with the admitted facts of the case. In the first place, if Sasanka was still engaged in experiments for the construction of a cheap lamp, how is it that he was in possession of so many completed discs and clamps ? In the second place for the purpose of an experiment in the construction of a lamp, it

[1] (1838) 2 Lewin C. C. 227.

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would be essential to have holes on the sides of the shells, into which a tube could be inserted for the passage of the gas generated. But no tube, no burner, no carbide, nothing except a solitary cock, was found in the room ; nor was there any hole on the side of either of the two tin cases in which a tube could have been inserted. In the third place, for the purposes of a lamp, even at the experimental stage, a disc with a pinhole through which water could pass slowly from one of the chambers to the other, where the carbide would be kept, would be essential but none such was found. On the other hand, several discs were found with large perforations, precisely as in the case of discs used in actual bombs. In the fourth place, this theory of an acetylene generator was not suggested till a very late stage of the trial. Mr. Lowman, who was present at the search, asked Sasanka what Exhibit I was, as soon as it came into his hands. The only answer which Sasanka gave was "look and see for yourself." Sasanka was subsequently asked the same question by Mr. Tegart and Mr. Denham, but he declined to give any explanation as to the articles found. More than this, there was not the remotest suggestion that he was engaged in experiments on the construction of an acetylene generator, during the entire period that the trial lasted in the Court of first instance from the 19th December, 1913 to the 21st February, 1914. In the fifth place, if Sasanka, as he stated before the Sessions Judge, was still engaged in experiments at the time of his arrest, how was a model lamp, such as he had in contemplation, prepared and got ready for use under his instructions while he was under arrest ? The generator theory was first put to Colonel Muspratt Williams in course of cross-examinations on the 6th April, 1914. Mr. Craig of the Linde Ice Factory under whom Sasanka had worked in the Oxyacetylene Department, was examined on the 24th April, 1914, and the generator theory was again put to him in cross-examination. But these experts pronounced the idea to be impracticable. It now transpires from the evidence that, in the interval, on or about the 16th April, 1914, a model lamp had been prepared by a tinsmith under instructions from Sasanka conveyed through his pleader. With the article so constructed, Sasanka gave an exhibition in Court on the 14th May, 1914, and demonstrated that the gas generated by contact of the water with the carbide, when

carried through a tube affixed to the side of the tin shell and ignited with a match, gave a tolerably bright light. The exhibition was repeated in this Court by Counsel for the accused. It is not necessary to discuss whether what was exhibited as a lamp was capable of practical use of such ; the answer would depend upon various factors which have not been investigated, for instance, the total cost of construction of the article, the price of the carbide consumed, the time during which the light would burn, the strength of the generator to keep the gas intact, and other like matters. Let us assume, however, that the article exhibited was fit for use as a lamp and negatives the confident opinion to the contrary given by expert witnesses. The question inevitably arises, when did Sasanka complete his investigation, as, according to his own statement, he was still in the experimental stage when he was arrested and the articles were seized. The truth is that the theory of a generator is an ingenious after-thought of a well skilled mechanic employed in the Oxyacetylene Department of the Linde Ice Factory. In the sixth place, if Sasanka was engaged in experiments upon the construction of a cheap generator, one might, not unnaturally, have expected to find in his library books and papers on acetylene and on generators ; on the other hand, what was found in his possession was seditious literature which advocated the use of bombs for the attainment of revolutionary ideals. Upon a review, then, of all the circumstances of the case, the conclusion appears irresistible that Exhibit I and the other exhibits similar to its component parts, were intended for use, not as acetylene generators, but as bomb-shells. The fact that they were kept in the room, apparently without any attempt at secrecy, is explained by the circumstances that they were not calculated to attract the attention, much less to excite the suspicion, of persons not familiar with the mechanism of this particular type of bombs and their construction. We are not unmindful that, as has been strenuously argued by Counsel for defence, in criminal cases there can be no conviction unless guilt is established with very great clearness. This presumption of innocence signifies no more that this, that if the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt ; in other words, as Thayer points out (Evidence at the Common Law, page 558), the "whole

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Sasanka, were intended for use in British India. We must hold accordingly that all the elements necessary to sustain a conviction under Section 4 (*b*) of the Explosive Substance Act, 1908, have been established in the case of Sasanka. The elements essential for a conviction under Section 120-B, Indian Penal Code, have also been made out. Consequently, his conviction under both the charges must be upheld.

We have next to consider the individual cases of the group of three persons found in the room of Sasanka on the morning of the 21st November, 1913, namely, Chandra Sekhar, Saroda and Dinesh; we shall discuss them in the order just named.

Chandra Sekhar appears to have made the acquaintance of Sasanka in Dacca for the first time in the year 1908, but there is no evidence to show that any communications had passed between them during the five or six years which had elapsed since then. He is proved to have been employed for some time passed in the Kohinoor Printing Press at Chittagong owned by his brother and the record of his attendance there shows that there he had not left Chittagong for at least two years prior to his arrest in Calcutta. On the 15th November, 1913, he left Chittagong for Calcutta on business connected, it is alleged with the press. He arrived at Calcutta on the evening of the 16th November, and is shown to have spent the night in the house of Babu Kshitishchandra Sen, Vakil of this Court, who comes from Chittagong. Next day he went to the place of his cousin Saroda Charan Dey, with whom he remained until the evening of the 20th November; he left that evening at about 8 or 8-30, saying that he was to visit a friend who had invited him. In the interval he is proved to have paid a visit to the firm of Messrs. S. K. Lahiri & Co., in connection with the printing of question paper for the Chittagong Municipal School. He asserts that one of the objects of his visit to Calcutta was to expedite the printing and despatch of these question papers. His second object, he alleges, was to visit the firm of Messrs. Erasmus Jones & Co., for the purpose of fancy cards and coloured papers for his press. It is not shown, however that he visited the latter firm, and it is doubtful whether he went to their premises; at any rate, it is proved that he did not meet the proprietor of the firm or the head clerk. In the early hours of the morning of the 21st November, 1913, when the door was opened by Sasanka in

response to the demands of the Police, Chandra Sekhar was one of the three persons found asleep in the room. To account for his presence in the room, he alleges that on the 18th or 19th November, he had met Sasanka (whom he knew by his real name Amrita Lal) at the Ram Krishna Book Depôt where he himself had gone to purchase some books. Sasanka invited him to his place one evening for a chat, so he went there on the evening of the 20th November and as it grew late, he was asked to spend the night there. He stayed, and early in the morning he was arrested by the Police. There is nothing inherently improbable in this story. On the other hand, any possible theory that he had come down to Calcutta from Chittagong at the invitation of Sasanka for the purposes of a criminal conspiracy, is negatived by two significant facts. In the first place, when arrested, the return half of a railway ticket was found in his possession; this was produced by the prosecution after considerable effort on the part of the defence and was even then not made an exhibit. The defence has suggested that, in this respect, the prosecution was designedly obstructive. The precise attitude of the prosecution in this matter cannot be very clearly made out from the record. But we desire to emphasise the view expressed by Jenkins, C.J., in *Ramranjan Roy* v. *Emperor*[1], in conformity with the ruling in *Regina* v. *Holden*[2], that it is the duty of the prosecution not so much to secure a conviction as to place all the evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined. This return ticket shows that Chandra Sekhar, when he left Goalundo on his way from Chittagong to Calcutta, intended to return within 6 days. In the second place he had started from Chittagong with the very small sum of Rs. 10 : out of this, he left one half with Babu Kshitish Chandra Sen in Calcutta. It could hardly have been his intention, with this small sum at his disposal, to prolong his stay in Calcutta or to engage in a conspiracy for the manufacture of explosives. In fact, the only circumstance against him is his presence in the room of Sasanka on the morning of the arrest; of this, as we have stated, he has offered a not improbable explanation. The Sessions Judge was, as appears from his judgment, considerably

[1] (1914) I. L. R. 42 Calc. 422; 19 C. W. N. 28.
[2] (1838) 8 C. & P. 606, 609.

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influenced in his opinion against this accused by the evidence of his association with Pulin Behary Das and the Anusilan Samity in 1908. That evidence, as we have already held, was inadmissible and should not have been admitted. We further observe that the Sessions Judge mentions that this accused had, on the 20th November, 1908, taken out a seditious book *Mookti kone pathay* from the Samity Library. This evidence is not quite trust-worthy, and had it not been inadmissible would have been entirely valueless; more than this, the book mentioned has not been exhibited and no proof whatever has been adduced as to the character of its contents. In our opinion, the evidence on the record is not sufficient to sustain the conspiracy charge against the accused Chandra Sekhar.

Saroda Charan Guha, the second of the three persons arrested in the room of Sasanka, comes of a family of some means and respectability, resident at Mulgaon in the district of Faridpur. Saroda is the third of the four sons of his father. His second brother Tara Charan is demented and his confined in a Lunatic Asylum. His youngest brother Debendra had, notwithstanding the protest of his father taken in marriage a girl of an inferior caste and had on this account been disinherited. Saroda himself had, as is amply proved by the evidence on the record, incurred the displeasure of his father and of other members of his family by reason of what they considered to be excessive devotion to his wife. The correspondence between the members of the family, which has been produced, shows that his conduct at the time of the annual Puja festival had excited unmistakable bitterness of feeling; he was charged not only with the neglect of his father during his illness but also with misappropriation of family funds: the imputation of misconduct in this respect as appears from the evidence, was, however a much exaggerated one, if not wholly unfounded. In these circumstances, he is shown to have left Faridpur on the 16th November and reached Calcutta on or about the morning of the 17th November. He states that although he had relations in Calcutta, he did not on his arrival put up with them, but preferred to go to an acquaintance who lived at 88, Upper Circular Road. The next day he happened to meet Sasanka who lived in the same street. Some evidence was adduced

to show that he had known Sasanka in 1908; he had at that time a shop at Gossainhat near Mulgaon in Faridpur. Sasanka was then in the employ of the Bazitpur Zemindars and had often to come to the Settlement Camp at Gossainhat Bazar. This is said to be how Saroda and Sasanka first became acquainted with each other. There is no evidence, however, to show that any communication had passed between the two since Sasanka left the place about the year 1910. Not only is there no trace of any correspondence between them, but the evidence makes it clear that Saroda had not been for at least ten years in Calcutta, where Sasanka was continuously employed since 1910. In these circumstances, after the lapse of several years, Sasanka and Saroda met again on or about the 18th November, 1913. Saroda says that he mentioned to Sasanka how he had quarrelled with his family and left them; he also told him that he had not much money with him and had, on arrival in Calcutta, been taken ill with fever. Sasanka offered to put him up in his own room till he got well, and this, according to Saroda, explains his presence in that room at the time of the search on the morning of the 21st November. There has been much animated discussion in this Court on the question, whether Saroda was in fact ill at the time. His jail history ticket shows that after his arrest on the 21st November, he was, on the 25th November, placed in hospital; his temperature was high, and according to Dr. Mulvany, who wrote to the Magistrate on the 26th November, Saroda apparently had fever for some days and was very weak then. Dr. Makhan Lal Mandal, who attended on him in jail, states that Saroda was at the time suffering from fever, possibly from about a week before. This fits in precisely with the evidence that Dr. Sengupta had seen Saroda and had prescribed medicine for him for fever on the 17th November. These facts render it extremely probable that Saroda was ill on or about the 17th November and that his illness continued up to the time he was taken to the jail hospital on the 25th November, though there is no direct evidence to show the precise extent of illness at the time of his arrest. The events so far narrated do not indicate any criminal act on the part of Saroda or tend to connect him with a criminal conspiracy. But, at the search, five letters were found, written by him on Sunday the 16th November, 1913

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though not posted at the time of his arrest. One of these is addressed to his brother Debendra who had misconducted himself and had been disinherited, and another is addressed to his uncle Bepin. Two letters are addressed to two elder sisters of his wife, Sarojini and Hemangini, another letter is addressed to his wife Charuhasini. Much controversy has centred round these letters, and it has been vigorously urged by the prosecution that they have a very sinister significance. In these letters, Saroda announced to his various relations that he made up his mind to apply himself to the practice of *yoga* and that he would accordingly remain incognito for a time; he also pressed them to induce his father to alter his testament and to disinherit him. He further stated that he would probably return in six months or a year and referred to the many difficulties in the way of practice of *yoga*. He exhibited great anxiety for the welfare of his wife and child in the interval. In one passage he said, "let me see how *mayer lila* (the inscrutable ways of the Mother) ends. It has been suggested on behalf of the prosecution that Saroda was about to embark on a very dangerous enterprise and that he was in fact the person selected by anarchist conspirators to throw the next bomb. This is nothing more than a suggestion; no evidence has been directed to establish this view, and we are unable to hold that the letters are sufficient to support the theory propounded. The language used in the letters is, no doubt, in some places, peculiar, but on the whole they appear to us to be not very unlike letters such as might be written by a man who had quarrelled with his family and who realised fully, as he himself says, in one of these letters, that he had to give up all hopes of paternal property unless he could act in obedience to the orders of his elders. Much stress has also been laid by the prosecution on the use of the expression *mayer lila*. That expression has in itself no evil significance and is frequently used by a person in distress who finds all effort unavailing and realises how inscrutable are the ways of Providence. At the same time there can be no question that, by a grievous and perverse misapplication of language,—an act of sacrilege which merits the strongest condemnation of all right-minded people—revolutionaries have applied the expression to describe anarchical outrages as if

they were deeds sanctioned by the great Mother of the universe. We have carefully considered the letters of Saroda, and with the knowledge we possess of the circumstances which very probably inspired them, we are unable to say that the expression *mayer lila* used therein has any sinister import. Reference has also been made to the difficulties mentioned in the practice of *yoga* and to the dangers involved therein. This does not, in our opinion, necessarily indicate any criminal purpose in view, for the practice of *yoga* by persons not fully qualified for such work has sometimes been attended with danger. There has been also much discussion as to the purpose Saroda had in view, when he wrote these letters; it is possible that he never seriously intended to practise *yoga* and that his only object was to write a series of what looked like farewell letters to all his relations, so as to excite their sympathy and make them intercede with his father with a view to bring about a reconciliation between the old man and his undutiful son. There has also been some discussion as to why the letters were never posted; it may be that Saroda changed his mind; it is also not improbable that as he was taken ill on his arrival in Calcutta, he could not post the letters. We may add that a desperate effort was made by the prosecution to interpret the term *yoga* in these letters in the light of a paper on *yoga* philosophy found in the room of Sasanka. No connection whatever has been established between the two. But even if Saroda was shown to have been aware of the contents of the *yoga* pamphlet, it would not in any way alter his position. The laborious attempt made by Counsel for the prosecution to interpret the *yoga* pamphlet in a sinister sense was not attended with success. An abstract philosophical disquisition on *yoga* cannot rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits, without positive proof that it was so used. At the same time, one cannot overlook the lamentable fact that the revolutionary literature brought to light in this instance and in other cases previously reported does suggest that such principles as the religious principle of absolute surrender to the Divine Will, a doctrine common to many religions, are employed by designing and unscrupulous men as a potent means to influence and unbalance weak-minded persons and thus ultimately bend them to become instruments in the

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commission of nefarious crimes from which they might otherwise recoil with horror. After a minute scrutiny, however, of the letters found in possession of Saroda, we are of opinion that, taken as a whole, they do not admit of the interpretation suggested by the prosecution and do not connect him with the conspiracy charged. Reference has also been made to the circumstance that Saroda undoubtedly gave a false name and incorrect addresses to the police, but he has offered a not unreasonable explanation of his conduct. He had been treated by the police for a long time as a political suspect, and his movements had been constantly watched, a position which even Mr. Tegart admits is not very pleasant. Such attentions on the part of the police are very irksome and Saroda may well have tried to evade observations. Besides, some foundation has been laid in the evidence to support the allegation of Saroda that he found himself in this unfortunate position, because of a quarrel with an influential Panchayet, Akhoy Kumar Guha, who gave information to the Police and had him placed under surveillance. It also transpires from draft petitions found in his possession at the time of his arrest, that he was about to move the police authorities to have his name removed from the list of political suspects, and to invite an enquiry into the mode of life he led. No weight can also be attached to the fact that when he left Faridpur, he mentioned to a pleader's clerk an untrue reason for his visit to Calcutta; this may well be explained by a not unnatural reluctance to disclose to every person his family quarrels. On the whole, then there is really no substantial evidence to connect Saroda with the conspiracy. But, as appears from the judgment of the Sessions Judge, he was to some extent influenced in his opinion against Saroda by evidence of his association with Pulin Behari Das and the Anusilan Samity many years ago. This evidence, as we have held, is inadmissible; but it is also really of the vaguest description and, even if admitted, does not throw any light on the case. Our conclusion is that the conspiracy charge against Saroda has not been established.

Dinesh Chandra Das Gupta forms the third member of the group of persons arrested in the room of Sasanka on the morning of the 21st November, 1913. His antecedent history has been determined with considerable approach to precision.

During the years 1910-12 Dinesh was a student in the Dacca College. On account of ill-health, his attendance at lectures fell short of the required minimum, and he left the college towards the close of the session, 1911-12. He appears to have lived with his parents at Faridpur during the next twelve months. In July, 1913, he took his admission into the Krishnath College at Berhampore, where he stayed till the 21st August, 1913. He then took a transfer certificate, came down to Calcutta, and, failing to obtain admission elsewhere, joined the Ripon College. He could not secure a seat in a licensed mess or hostel; he stayed accordingly first with a friend in College Street and then in 86-2, Mechua Bazar Street, apparently an unlicensed mess where students resided, from whence he intended ultimately to remove to the place of his brother-in-law at 74, Sukea Street. While resident at the Mechua Bazar Street mess, he became acquainted with one Jogesh Chandra Roy, who lived there and who, at the instance of the prosecution, has been named as a co-conspirator in the charge in this case; but Jogesh Chandra Roy has not only not been placed on his trial, but no evidence even has been adduced to prove his participation in the conspiracy. In September, 1913, while still resident at the Mechua Bazar Street mess Dinesh joined in the relief works undertaken to alleviate the distress of persons affected by the Damodar floods. It was here at Burdwan that he first became acquainted with Sasanka through Jogesh Chandra Roy. He got an attack of malaria in Burdwan, returned to Calcutta and went to his parents at Faridpur in the first week of October. He had a fresh attack of malaria there and could not return to Calcutta till the 12th November, 1913, some time after his College had re-opened. Next day, he attempted to remove from the Mechua Bazar Street mess to the place of his brother-in-law, but was informed that no room was available there. Consequently, he continued to live in the Mechua Bazar Street mess. He asserts that, on the 20th November, Sasanka came into the mess and asked for his help, as Sasanka had a sick friend (Sarada Charan Guha) in his own room who required to be nursed. Dinesh acceded to this request, accompanied Sasanka, stayed in his room during the night, and was arrested early in the morning by the Police. There is nothing intrinsically improbable

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on the face of this account. The only person, who could speak to the alleged incident of Sasanka's visit to the Mechua Bazar Street mess on the 20th November, was Jogesh Chandra Roy; the prosecution alleged him to be a co-conspirator but did not prosecute him. When the defence took out summons to cite him as a witness on their behalf, he was reported to have died. We are thus left with the undoubted fact that Dinesh was found in the room and his explanation as to how he was brought there. We have, in the next place, evidence adduced to show that Dinesh and Sasanka knew each other, and that Dinesh possibly now and then visited Sasanka. But nothing really turns on this evidence, because admittedly Dinesh came to know Sasanka in September, 1913, on the occasion of the Damodar relief works, yet it is worthy of note that no previous connection whatever between the two has been traced or suggested.

[See *Amrita Lal Hazra* v. *King-Emperor* in the Leading Cases on Evidence.] * * * * * * * *

We have next to consider the charge under section 4(*b*) of the Explosive Substances Act, 1908, against Chandrasekhar, Sarada and Dinesh, against whom, as we have just found, the conspiracy charge has failed. It is obvious, indeed, this was conceded by the Counsel for the Crown, that the charge under the Explosive Substances Act must necessarily fall along with the conspiracy charge. Reference was made to a number of judicial decisions to show under what circumstances a person may be deemed to be in possession of a movable: *Queen-Empress* v. *Sangam Lal*,[1] *Emperor* v. *Gajadhar*,[2] *Kashi Nath* v. *Emperor*,[3] *Ashruf Ali* v. *Emperor*,[4] *Emperor* v. *Hamid Ali*,[5] *Jojiban* v. *Emperor*,[6] *Peary Mohun* v. *Weston*,[7] *Weston* v. *Peary Mohun*,[8] *Kali Charan* v. *Emperor*[9] and *Nga Pu* v. *Emperor*.[10] No useful purpose would be served by an analysis of the circumstances of the various cases discussed at the Bar. It is sufficient to say that while it is not necessary to prove manual possession of the explosive substance by the accused, it must

[1] (1893) I. L. R. 15 All 129.
[2] (1903) I. L. R. 25 All. 262.
[3] (1905) I. L. R. 32 Calc. 557.
[4] (1909) I. L. R. 36 Calc. 1016.
[5] (1909) I. L. R. 37 Calc. 24.
[6] (1909) 13 C. W. N. 861; 9 C. L. J. 663.
[7] (1911) 16 C. W. N. 145.
[8] (1912) I. L. R. 40 Calc. 898, 922.
[9] (1913) I. L. R. 41 Calc. 537; 18 C. L. J. 514; 18 C. W. N. 309.
[10] (1911) 13 Cr. L. J. 122.

be proved that it was in his power or control; possession to be punishable must also be possession with knowledge and assent. The mere fact that Chandrasekhar, Sarada and Dinesh were in the room, does not show that they were in possession of all or any of the things contained therein; it is not shown that they were even aware of the existence of the tin cases, discs, and clamps, or that they were acquainted with their nature and purpose. We hold accordingly that the charge under Section 4(*b*) of Act VI of 1908 fails against each of these persons quite as much as the conspiracy charge. The result is in conformity with the well settled principle that when evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime: *Reg.* v. *Boulton*[1], *Emperor* v. *Lalit Mohan*[2].

We have to examine in the next place the case of Kalipada, who was arrested in College Street on the 6th December, 1913, with ten copies of the Liberty leaflet in his pocket. The only charge against him is that of conspiracy under section 120B, Indian Penal Code; there is no substantive charge against him under Section 4 of the Explosive Substances Act, 1908. As regards this accused, there has been a prolonged discussion on the question, how he came to be in possession of the liberty leaflets. Counsel on his behalf contended that the leaflets were planted in his pocket by a police spy, with a view to create evidence of conspiracy against him. This theory, which in our opinion has not been placed above the level of a bold hypothesis and has certainly not been established by the evidence, has been indignantly repudiated by the prosecution; the Crown has further sought to prove affirmatively, that the leaflets were printed by Kalipada himself at the Loke Nath Press where he was admittedly employed as a compositor. The evidence shows that Kalipada, whose real name is Upendra Lal Ray Chaudhury, belongs to a respectable family, resident at Benotia in the district of Faridpur. Their circumstances have altered for the worse, and Upendra found himself driven to earn his livelihood in Calcutta, where he came about the middle of the year 1912.

[1] (1871) 12 Cox. 87, 92.

[2] (1911) I. L. R. 38 Calc. 559, 579; 15 C. W. N. 593, 606.

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He used to reside at 119-4, Upper Circular Road, and obtained employment as a compositor in the Loke Nath Press. He alleges that he adopted the name Kalipada Ghosh, because he felt that his humble occupation might bring discredit upon his family. He was employed in the press from October, 1912 to the 6th October, 1913, on a regular monthly wage. Work in the press was thereafter temporarily suspended and his services were terminated. He was re-employed, however, on a daily allowance from the 10th to 16th November, 1913. There is internal evidence to show that the liberty leaflet was written after the 30th September, 1913, as it makes mention of the College Square outrage which took place on the 29th September and the Mymensingh bomb outrage which happened on the following day. If, therefore, the leaflet was printed at the Loke Nath Press, it might then have been printed between the 1st and the 6th October or between the 10th and the 16th November. Elaborate evidence of a circumstantial character has been adduced by the Crown to show that the leaflet was printed at the Loke Nath Press. A minute comparison has been made of the types required to print the leaflet with the types found in the press, and quite a number of remarkable coincidences has been discovered. All the types necessary to print the leaflet were found in the press but the most striking fact in this connection is the presence of a damaged T, which must have been used to print some of the copies of the leaflet. The damage to this type was obviously caused by a pin which fell across the face as the printing was in progress. It is extremely improbable that a similar accident to a similar type should have happened in some other press. More than this, coincidences almost equally remarkable have been noticed in the case of types of other letters which had either been damaged or had some special feature, some peculiarity in form or shape. This part of the case does not require much elaboration, because we agree in the conclusion of the Sessions Judge that the evidence, though circustantial, is practically conclusive. We hold then that the liberty leaflets found in the possession of Kalipada were printed at the press where he was employed as a compositor, and it is probable that they were printed by him. There is also indisputable proof that during the whole of the period that Kalipada was employed as a compositor, he was

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on friendly terms with Sasanka. They regularly took their meals at the same eating-house; there is also evidence to show that Sasanka guaranteed regular payment by Kalipada whom he introduced to the hotel-keeper; it is further clear that as Sasanka moved from one hotel to another, Kalipada followed him. The question consquently arises, how far this association between Sasanka and Kalipada carries the case against the latter. In this connection, it must not be overlooked that there is no evidence to show that the "liberty leaflets" were printed by Kalipada at the instance or under the direction of Sasanka, and that when the leaflets were first found in his possession Sasanka had already been in custody for two weeks. But it has been suggested on behalf of the Crown, that they must have been actually printed before Sasanka was arrested. If it be assumed, however, that they had been printed by Kalipada under the direction of Sasanka it is remarkable that no copy was found when his room was searched on the 21st November. But even if the theory be accepted that the leaflets were printed by Kalipada under the direction of Sasanka, the case against Kalipada is not materially advanced. No doubt, the leaflet is a seditious document of an inflammatory character and advocates the use of bombs for purposes of assassination. But it does not follow that even if Sasanka employed Kalipada to print and disseminate seditious literature, he confided to him all his secrets and took him in as a member of the conspiracy to make and possess explosive substances. There is also no evidence to show that Kalipada was in any way an assenting party to the conspiracy in which Sasanka was engaged or that he was even aware of its existence. There is a further circumstance which militates against such an hypothesis. According to the prosecution, the conspirators had assembled on the night of the 20th November to hold an important conference; if this assumption be well founded it is remarkable that Kalipada should have been absent from that meeting. In fact, when all the circumstances come to be analysed, the two outstanding facts proved against Kalipada are that a fortnight after the arrest of Sasanka he was arrested in College Street with copies of a revolutionary leaflet in his pocket which had been printed most probably by himself at the press where he was employed as a compositor. In our opinion, whatever suspicions one may

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entertain as to the mental tendencies of Kalipada, there is not sufficient evidence to connect him with the particular conspiracy charged.

We have next to consider the appeal preferred by the Crown against the acquittal of Khagendra Nath Choudhury. Evidence was adduced in the Sessions Court to prove that his real name was Khagendra Nath Choudhury and that he had assumed the name of Suresh Chandra Choudhury for a dishonourable purpose. Suresh, his fellow student and co-villager, had passed the Intermediate examination while he himself was unsuccessful; but he passed himself off as Suresh to enable him to secure the appointment of a teacher in a school at Bhastara in the district of Hooghly. On behalf of the defence, it was centended that this evidence was inadmissible under section 54 of the Indian Evidence Act, but the objection was overruled. In our opinion, as it was admitted that Khagendra had assumed a false name. evidence should not have been allowed to prove the dishonourable purpose for which the false name had been assumed, a purpose no way connected with the conspiracy charged against him. It is an elementary rule that a man's guilt is to be established by proof of the facts and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt. As Stephen observed in his General View of the Criminal Law of England (Ed. 1863, page 309) "a man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of commiting the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two person; if general bad character is too remote, *a fortiori*, the particular transaction of which that general bad character is the effect, are still further removed from proof; accordingly it is an inflexible rule of English Criminal Law to exclude evidence of such transaction." We must consequently take no account of the circumstances under which Khagendra assumed the name of Suresh. When we come to examine the evidence relevant to the conspiracy charge, we find this much established that he was acquainted with both Sasanka and Kalipada: he appears to have come

down on more than one occasion from Bhastara to Calcutta on account of illness and to have stayed in the room of the one or the other in Upper Circular Road; in fact, in each of these rooms medicine prescribed for him and partially used was found. But the mere fact that Khagendra was acquainted with Sasanka and Kalipada and was possibly on friendly terms with them, is obviously insufficient to connect him with the alleged criminal conspiracy. Considerable stress, however, has been laid upon a letter written by one Biroja from Calcutta on the 17th November 1913, and found in the room of Khagendra at Bhastara. In this letter Biroja promises to send "new paper" in a few days. On behalf of the Crown it has been suggested that the new paper mentioned in the letter refers to the liberty leaflet; the suggestion, however, can take rank only as an unproved hypothesis. More than this, there is no evidence to show who this Biroja was, although, at the instance of the Crown he was named as a co-conspirator in the charge. We know nothing about his activities, and although an attempt was made by some of the prosecution witnesses to prove that a man named Biroja lived with Kalipada for a few days, that evidence when scrutinised turns out to be contradictory and unreliable. We agree with the Sessions Judge that the evidence is not sufficient to connect Khagendra with the particular conspiracy charged.

[See *Amrita Lal Hazra* v. *King-Emperor* in the Leading Cases, Law of Evidence.] * * * * * * *

A question has been raised here as to the procedure provided in Section 360, Sub-section (1) of the Criminal Procedure Code. The Sessions Judge appears to have strictly carried out the provisions of the section, which require that the evidence of each witness as it is completed shall be read over to the witness in the presence of the accused, if in attendance or of his pleader if he appears by a pleader. This procedure appears to have occupied considerable time, but in view of the decisions in *Mohendra Nath* v. *Emperor*,[1] and *Jyotish Chandra* v. *Emperor*,[2] which are in accord with the case of *Kamatchinathan* v. *Emperor*,[3] and were binding on the Sessions Judge, it must be ruled that the procedure he followed is not open to criticism. We may add that in

[1] (1908) 12 C. W. N. 845.
[2] (1909) I. L. R. 36 Calc. 955.
[3] (1904) I. L. R. 28 Mad. 908.

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a case of this description, where every possible point was likely to be contested, a strict compliance with the statutory provisions was manifestly desirable.

A question has been raised in this Court as to the propriety of the procedure adopted by the Sessions Judge when he accepted written statements from the accused, and our attention has been drawn to *Emperor* v. *Ansuiya*.[1] It is sufficient to state that no objection was taken by the Crown in the Court below when the statements were tendered and received. The procedure followed in this case is in accordance with what we believe is the universal practice in the Courts of this Province, and we do not feel pressed by the doubt suggested in the case mentioned. But it is desirable to state explicitly that such a written statement does not take the place of evidence nor of such examination of the accused as is contemplated by the Code.

Only one other question now requires consideration, namely, the question of sentence upon Sasanka. Counsel on his behalf pressed for a reduction of the sentence, should our ultimate conclusion be in favour of conviction. The Crown, on the other hand, has obtained a rule for enhancement of sentence. After anxious consideration of the matter, we have formed the deliberate opinion that the order of the Judge should not be touched in this respect. The offences, of which Sasanka has been proved to be guilty, are of the gravest character, and their heinousness is, if possible, accentuated by the fact that the bombs under construction, if completed, would have been employed for the destruction of human life. The demands of justice, consequently, require a deterrent sentence. At the same time, we are of opinion that the maximum sentence should be reserved for offences of even a worse description, which, it is not difficult to imagine, might fall within the scope of the Explosive Substances Act. From these points of view, the sentences passed on Sasanka by the Sessions Judge are appropriate and should not be disturbed.

The result of our decision may be now summarised. Appeal No. 587 of 1914 preferred by Amrita *alias* Sasanka is dismissed. Appeals Nos. 588, 589, 590 and 598 preferred by Dinesh, Saroda, Chandra Sekhar and Upendra *alias* Kalipada are allowed. The convictions and sentences upon each of these persons are set

[1] (1903) All. W. N. 1.

aside, and we direct that they be released from custody. Appeal No. 4 of 1914, preferred by the Crown against the acquittal of Khagendra *alias* Suresh is dismissed. Rule No. 1293, issued at the instance of the Crown for enhancement of sentences, is discharged.

Appeals Nos. 588, 589, 590 and 598 of 1914 allowed.

Appeals Nos. 587 and 4 of 1914 dismissed.

Rule No. 1293 of 1914 discharged.

NOTE.

Several important questions of law of procedure and evidence in "conspiracy cases" have been raised, discussed and decided in this case. One of the points to be noted is the question whether for the purpose of proof of the conspiracy charged, the evidence of association with certain persons who had previously been convicted of offences under Section 121A of the Indian Penal Code, is relevant and it has been held that it is not so. Another ground of appeal was that there were misjoinder of charges. In this connection see the cases cited and also the case of *Pulin* v. *King-Emperor* (1912) 15 C. L. J. 570. Another ground of appeal was that persons who were alleged to be conspirators in the charge had not been prosecuted, although there names and addresses were known to the prosecution. But this ground also failed. In a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the defendants took part in it.

In criminal cases the duty of the prosecution is not so much to secure a conviction as to place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined (p. 360) see also *Emperor* v. *Nogendra* (1915) 21 C. L. J. 396 403.

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[*Reported in 15 C. L J. 517, 570—582 s.c. 16 C. W. N. 1105, 1126—1136.*]

The following is the judgment of Mookerjee J. :—

This is an appeal on behalf of 35 persons who have been convicted under section 121A of the Indian Penal Code. Originally, 45 persons were prosecuted, of whom one was discharged by the committing Magistrate, and 8 others have been acquitted by the Sessions Judge. Of the remaining 36 persons, one is said to have become insane and has not appealed to this Court. We are, therefore, concerned with the case of the remaining accused persons only. On their behalf, the judgment of the Sessions Judge has been assailed not only as contrary to the weight of the evidence on the record, but also as bad on four grounds of law, each of which, it has been contended, is sufficient to vitiate the convictions. These grounds must obviously be considered in the first place, and they have been formulated by the learned counsel for the appellants in the following form, namely, *first*, that the proceedings are bad because they were not upon complaint made by order of or under authority from the Local Government within the meaning of section 196 of the Code of Criminal Procedure; *secondly*, that assuming that there was a sanction by the Local Government, the sanction was bad for vagueness, inasmuch as the particular complaints were not authorised thereby; *thirdly*, that the complaints themselves were not complaints of facts within the meaning of section 190 (*i*) (*a*) of the Criminal Procedure Code, and could not form the foundation for the initiation of any valid criminal proceedings; and, *fourthly*, that the trial was vitiated by the misjoinder of charges contrary to the provisions of the Criminal Procedure Code.

In support of the first ground, it has been argued that before a Court can take cognizance of any offence punishable under section 121A of the Indian Penal Code, the essential

pre-requisite is a complaint made by order of or under authority from the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf. In the case before us, the complaint was not made under authority from, or by an officer empowered by, the Governor-General in Council; the complaint purported to have been made by order of the Local Government. Now, the expression 'Local Government' as defined in section 3(29) of the General Clauses Act, 1897, means the person authorised by law to administer executive government in the part of British India in which the Act containing the expression operates. It has been argued that the Lieutenant-Governor of Eastern Bengal and Assam, by whose order the complaint was made, was not the person authorised by law to administer executive government in that part of British India, because the province of Eastern Bengal and Assam was irregularly constituted and the Lieutenant-Governor himself as such was irregularly appointed. In other words, if the contention of the appellants is well-founded, the only person competent to authorise a complaint under section 196 of the Criminal Procedure Code was the Lieutenant-Governor of Bengal. The argument of the appellants also involves by necessary implication the position that the Court of Session was irregularly constituted because the Lieutenant-Governor of Eastern Bengal and Assam who acted in this behalf was not the Local Government within the meaning of section 9 (*i*) of the Criminal Procedure Code. The line of reasoning by which this position has been sought to be supported has been lucidly and concisely stated in the following manner by the learned counsel for the appellants. He has argued that the procedure embodied in Proclamation 2832 of the 1st September 1905 for the constitution of the province of Eastern Bengal and Assam was *ultra vires* and that the result achieved by means of the Proclamation could have been validly attained only by Parliamentary Legislation, in view of the provisions of 3 and 4 Will. IV, c. 85; 5 and 6 Will. IV, c. 52; 16 and 17 Vict. c, 95; 17 and 18 Viet. c. 77; 24 and 25 Viet. c. 67; and 28 and 29 Vict. c. 17. Section 38 of 3 and 4 Will. IV. c. 85, provides that the Presidency of Fort William in Bengal, is to be divided into two Presidencies, namely, Bengal and Agra. Section 56 provides

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that the Executive Government of the Presidencies is to be administered by the Governor in Council, of the Presidencies of Fort William in Bengal, Fort St. George in Madras, Bombay and Agra respectively. The Statutes 5 and 6 Will. IV. c. 52 gives powers to the Court of Directors to suspend the execution of these provisions so far they relate to the creation of the Government of Agra, and during such suspension gives powers to the Governor-General in Council to appoint a Lieutenant-Governor for the North-Western Provinces. Under section 15 of 16 and 17 Vict., c. 95 the suspension is continued, and the appointments and arrangements made with regard to the North-Western Provinces are kept in force. It is worthy of note that Parliamentary Legislation was thus deemed necessary to create a Lieutenant-Governorship out of the Presidency of Fort William in Bengal. Section 16 of 16 and 17 Vict. c. 95 provides that a separate Governor shall be appointed for the Presidency of Fort William in Bengal as in Madras and Bombay, as provided by 3 and 4 Will. IV c. 85; but it is laid down that pending such appointment, it would be lawful for the Court of Directors to authorise the Governor-General of India to appoint a Lieutenant-Governor for the Presidency. Section 17 provides that the Directors may create one Presidency and authorise the Governor-General in Council to appoint a Lieutenant-Governor. The section provides at the same time that the arrangements hereinbefore authorised would be continued for the territory now and heretofore under the Presidency of Fort William. Statutes 17 and 18 Vict. c. 77 transferred to the Lieutenant-Governor of Bengal the power formerly exercised by the Governor-General in Council in respect of the Presidency of Fort William in Bengal, leaving to the latter a residue of powers in respect of the territories not so transferred. Section 3 of the same Statute gives powers to the Governor-General to take territories under his direct authority and management and to provide for their administration. With reference to these provisions, it has been argued by the learned counsel for the appellants that neither the Governor-General in Council nor the Secretary of State for India in Council can create a new Lieutenant-Governorship or divide the Presidency of Fort William in Bengal without special Parliamentary Legislation. Reliance has also been placed on

sections 22, 46, and 47 of 24 and 25 Vict. c. 67, and with reference to the two latter provisions it has been contended that section 46 applies only to territories not forming part of the Presidency at the time of its creation; and this view has been sought to be supported by reference to the terms of sections 4 and 5 of 28 and 29 Vict. c. 17. The question thus raised as to the legality of the redistribution of territory and the creation of the Lieutenant-Governorship of Eastern Bengal and Assam by proclamation and, without Parliamentary Legislation, is not free from difficulty, and in my opinion, there is some apparent force in the contention of the appellants that the language of the Satutes has been strained and their provisions applied in a manner not contemplated by the framers thereof. But it is not necessary to pronounce a final opinion upon the legality of the procedure adopted for constitution of the province of Eastern Bengal and Assam and for the appointment of a Lieutenant-Governor of the province so constituted, because in my view the question does not arise in the present proceedings. The complaint in the case before us was made under authority from and by order of the *de facto* Local Government and was sufficient for the validity of the proceedings. The learned counsel for the appellants has contended upon the authority of the decision in *Empress* v. *Burah*[1] and *Hari* v. *Secretary of State for India*[2] that it is competent to the Court to examine the legality of the procedure adopted for the creation of the Province; this position may be conceded to be sound [*cf.* Dicey on the Law of the Constitution, pp. 96-98.]; but the true question which requires examination is whether the sanction by the *de facto* Local Government is or is not sufficient for the validity of the trial.

It is well-settled that the acts of one who, although not the *de jure* holder of a legal office, was actually in possession of it under some colour of title or under such conditions as indicated the acquiescence of the public in his actions, could not be collaterally impeached in any proceeding to which such person was not a party: *Parker* v. *Kett*[3] and R. v. *Bedford Lavel*[4]. The view, however, has sometimes been maintained that

[1] (1878) I. L. R. 4 Calc. 172.
[2] (1903) I. L. R. 27 Bom. 424.
[3] (1693-1701) 1 Ld. Raym. 658.
[4] (1805) 6 East. 359.

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there can be no *de facto* officer where there is no office *de jure*: *Norton* v. *Shelby County*[1]. But the contrary opinion has been maintained upon weighty reasons; and it has been held that an unconstitutional law establishing an office, may until such law has been declared unconstitutional, be regarded as conferring colour of title, and that the incumbent of such an office should be treated as a *de facto* officer. The two fundamental pre-requistes to the existence of a *de facto* officer are, *first* the possession of the office and the performance of the duties attached to it; and *secondly*, colour of title, that is, apparent right to the office and acquiescence in the possession of it by the public. The proposition that the official acts of public officers, in an office created by an unconstitutional procedure, performed before its unconstitutional character has been declared by an authoritative decision, cannot be collaterally attacked, is illustrated by more than one decision to be found in the books. In *Clarke* v. *Common-wealth*[2], the prisoner had been convicted of murder in a Court, the Judge of which was exercising functions in a county attached to his district subsequent to his election, and his contention on appeal was that the Act of the Legislature by which such addition of territory was attempted to be made was unconstitutional. But the Court held that the question could not be raised collaterally, that the Judge was a Judge *de facto* and as against all but the Commonwealth a Judge *de jure*: and the murderer was hanged. In *Campbell* v. *Commonwealth*[3], the prisoners had been convicted of arson in burning a dwelling-house and other buildings. Two associate Judges sat with the President Judge and participated in the trial and sentence. The validity of their title to the office, and hence the composition of the Court, was questioned in appeal on the ground that they had been elected to their office unconstitutionally. It was held that they were Judges *de facto* and as against all parties but the Commonwealth they were Judges *de jure*, and having at least a colour of title to their offices, their title thereto could not be questioned in any other form than by *quo-warranto* at the instance of the Commonwealth. The result was that the burners of the

[1] (1885) 118 U. S. 425.

[2] (1857) 29 Pa. 129.

[3] (1880) 96 Pa. 344.

dwelling-houses went to the penitentiary for eight years, though at a subsequent term the associate Judges were ousted in an action in *quo-warranto* brought by the Attorney-General. Of like import is the decision in *Coile* v. *Commonwealth*[1] and the murderer was executed. See also *State* v. *Carroll*[2], *State* v. *Gardener*[3] and *King* v. *Philadelphia Co.*[4]. A somewhat similar attempt was made in this country in *Queen Empress* v. *Ganga Ram*[5], where the appointment of Mr. Justice Burkitt as a Judge of the Allahabad High Court was unsuccessfully questioned; the decision, however, is practically valueless in view of the pronouncement by the Judicial Committee in *Balwant Singh* v. *Rani Kishori*[6] that the learned Judge has been validly appointed to his office.

The doctrine that the acts of the officers *de facto* performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding as if they were the acts of officers *de jure*, dates as far back as the Yearbooks, and it stands confirmed, without any qualification or exception, by a long line of adjudication. Viner says "acts done by an officer *de facto* and not *de jure* are good, for the law favours one in a reputed authority." (Abridgment, Tit. Officers and Offices, G. 4.) In fact, the question for determination in cases involving the application of the *de facto* doctrine, is not, as a rule, whether the challenged acts, asssuming the officer to be *de jure* as such, are valid, but whether are person whose title is questioned, is or was really a *de facto* Officer.

The earliest case on record I have been able to trace is to be found in the Yearbooks under the name of the *Abbe de Fontaine*[7] decided in 1431. The action was on a bond given by one who illegally held the office of abbot of the convent of Fontaine, for supplies furnished to the convent. The office was elective, and though the unlawful holder had obtained only a minority of the votes, yet he had procured himself to be inducted by the ordinary, and had taken possession of the abbacy. Subsequently, however,

[1] (1883) 104 Pa. 117.
[2] (1871) 38 Conn 449, 9 Am. Rep. 409.
[3] (1896) 53 Ohio St. Rep. 145, 31 L. R. A. 660.
[4] (1893) 154 Pa. 160, 31 L. R. A. 141.
[5] (1894) I. L. R. 16 All. 136.
[6] (1897) I. L. R. 20 All. 267, L. R. 25, I. A. 54.
[7] (1431) Y. B. 9. H. 6. Fol. 32.

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the duly elected abbot displaced him and was in turn induced into office. The action was brought against the latter on the bond of his predecessor, and he pleaded the invalidity of the same on the ground that it had been given by one who never was the lawful abbot of the convent. The Court overruled this contention, and considered the bond valid, because given by the person who at the time was in fact the abbot. It is remarkable that the language used by Chief Justice Babington plainly indicates the principles of the *de facto* doctrine were even then not entirely new. From this period, the *de facto* doctrine rapidly spread in England, and became firmly established, as is clear from a long series of decisions dealing with its various features and expanding its principles to meet the requirements of diverse circumstances and different times. We may briefly state that these cases illustrate the following positions : *first*, that a person presented by an usurping patron, who was wholly without authority to present, was a good person *de facto* : *Abbey of Fontaine*[1] ; *secondly*, that a clerk of a Lord of the manor holding a manorial court without any authority whatever and deriving colour only from his known relation to the Lord of the Manor as a simple clerk, was a good officer *de facto* : *Knowles* v. *Luce*[2] ; *thirdly*, so of the servant of a steward holding a manorial court without authority from the steward or the law : *Lord Dacre's case*[3] ; *fourthly*, so of the deputy of a deputy to whom authority could not be delegated : *Leak* v. *Howel*[4] ; *fifthly*, so of the steward of a manor appointed not by the Lord who alone had the power to appoint, but by county officers who had no authority whatever to appoint : *Harris* v. *Fays*[5] ; *sixthly*, a reaffirmation of the doctrine by Lord Holt that the deputy of a deputy has sufficient colour to make him a *de facto* officer : *Parker* v. *Kett*[6], which is not inconsistent with the decision in *Rex* v. *Lide*[7] and, *seventhly*, the adoption of Lord Holt's definition that an officer *de facto* is none other than he who has the reputation of being the officer he assumes to be, although he is not such in point of law, by Lord Ellenborough in *Rex* v.

[1] (1431) Y. B. 9 H. 6. Fol. 32.
[2] (1580) Moore 100.
[3] (1553) 1 Leonard 288.
[4] (1596) Cro. Eli. 533.
[5] (1599) Cro. Eli, 699.
[6] (1693-1701) 1 Ld. Raym. 658, 12 Mod. 467, very incorrectly reported in Strange 1090.
[7] (1738) Andrews 163

Bedford Level[1] ; amongst later decisions in which the existence of the *de facto* doctrine as a well settled rule of law, is fully acknowledged, may be mentioned *Margarat* v. *Hannam*[2], *R.* v. *Herefordshire*[3], *R. Slythe*[4], *De Grave* v. *Monmouth*[5], *R.* v. *Dolgelly*[6], *Penney* v. *Slade*[7], *R.* v. *St. Clement*[8], *R.* v. *Mayor of Cambridge*[9], *R.* v. *Cheshire*[10], *Seadding* v. *Lorant*[11], *Lancaster* v. *Heaton*[12], *Waterloo* v. *Cull*[13] and *Mahony* v. *East Holroyd*[14].

The application of this doctrine of *de facto* officers admits of illustration from well-known historical events. The *de facto* doctrine received a solemn recognition from an Act of Parliament passed in 1461. This was after the House of York had re-asserted its title to the Crown of England and succeeded in establishing it in the person of Edward IV. The Statute Edw. IV. C. I. declared that the previous Henrys of Lancaster were usurpers, but, to avoid great public mischief, also declared them kings *de facto* ; the *de facto* doctrine was carried so far with respect to the English Crown that treasons committed under Henry VI, not in aid of the lawful claimant, were punished under Edward IV. It is further stated in Bacon's Abridgment (Prerogative A) that "it had been settled the all judicial acts done by Henry VI while he was king and also all pardons of felony and charters of designation granted by him are valid." The history of England affords another memorable instance of the application of the *de facto* doctrine. On the death of Charles I, Charles II immediately became King of England *de jure*, and the years of the reign of Charles II are to this day counted from the death of Charles I ; yet there was an interval of eleven years between the death of Charles I and the restoration of Charles II, during the greater part of which, under the Protector, a government maintaining order and able to enforce its authority existed. Sir Matthew Hale, though he never formally recognized the government of Cromwell sat as a Judge of the Common Bench, as the Court of King's Bench was

[1] (1805) 6 East 356.
[2] (1819) 3 B. & Ald. 266, 22 R. R. 378.
[3] (1819) 1 Chitty 700.
[4] (1827) 6 B. & C. 240, 30 R. R. 312.
[5] (1830) 4 C. & P. 111.
[6] (1838) 8 A. & E. 561.
[7] (1839) 5 Bing. N. C. 319.
[8] (1840) 12 A. & E. 177.
[9] (1840) 12 A. & E. 702.
[10] (1840) 4 Jur. 484.
[11] (1851) 3 H. L. C. 418 affirming 13 Q. B. 706.
[12] (1858) 8 E & B. 952.
[13] (1858) 1 El. & El 213.
[14] (1875) L. R. 7. H- L. 869, I. R. 9 C. L. 306.

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called in Cromwell's time, administering the plenary jurisdiction of the Court, in the adjudication of cases involving title to property as well as those affecting civil liberty. At the Restoration, he sat in the same Court as Lord Chief Justice of the King's Bench. His explanation is well-known, and was to the effect that the public business must go on and justice be administered alike under *de facto* and *de jure* governments. (See Life of Sir Matthew Hale by Bishop Burnett and also by Dr. Williams). For other illustrations of a similar character, reference may be made to the cases of *Bank of North America* v. *McColl*[1] where the question arose as to the validity of judicial proceedings in the Saint Domingo Courts not constituted by authority of the French Government, and *King* v. *McDonough*[2], where the question arose as to the validity of the judgment of a Spanish Court rendered in Louisiana, after the cession of that country to the American Union but before the formal surrender.

To the same effect is the decision in *Horn* v. *Lockhart*[3], where the question was raised as to the validity of the decisions of the Courts of the Confederate States of America during the War of Secession. The position is thus now firmly settled in England, in the United States and in Canada, that the title of *de facto* judicial officers is not collaterally assailable. *Hippsley* v. *Tucker*[4], *People* v. *Sassoville*[5], *O'Neil* v. *Attorney-General*[6], *Speeres* v. *Speeres*[7], *Parker* v. *Parker*[8]. See also the case of Sir Edward Coke, who, though only a *de facto* member of Parliament in 1626, was granted privilege against a suit in Chancery commenced against him by the Lady Cleare[9].

It is not necessary for our present purpose to investigate exhaustively all the qualifications or limitations subject to which the *de facto* doctrine has to be applied. The substance of the matter is that the *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and the individual where those interests were involved in the official acts of persons exercising the duties of an office

[1] (1812) 4 Binn 371.
[2] (1834) 8 Peter 308.
[3] (1873) 17 Wallace. 570.
[4] (1677) 2 Lev. 184.
[5] (1866) 29 California 480.
[6] (1896) 26 Canada. Sup. Court. 122, 1 Canada. Cr. Cas, 303.
[7] (1896) 28 O. R. 188.
[8] (1840) 8 Paige 428.
[9] (1626) 1 Douglas Ele. Cas. 425, 444.

without being lawful officers. The doctrine in fact is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to collaterally challenge the authority of and to refuse obedience to the Government of the State and the numerous functionaries through whom it exercised its various powers, on the ground of irregular existence or defective title, insubordination and disorder of the worst kind would be encouraged. For the good order and peace of society, their authority must be upheld until in some regular mode their title is directly investigated and determined. See the observations in *Scudding* v. *Lorant*[1], and *Norton* v. *Shelby County*[2]. In the matter now before us, the saction under section 196 of the Criminal Procedure Code was granted by the *de facto* Local Government and the cognizance of the case has been taken by the *de facto* Sessions Judge. In my opinion, it is not open to the appellants to question collaterally the legality of the conviction upon the allegation that the Local Government was irregularly constituted and the Sessions Judge irregularly appointed. The first ground upon which the legality of the trial is assailed must consequently be over-ruled.

In so far as the second ground is concerned, it has been contended that the sanction under section 196 of the Criminal Procedure Code is vague, because it does not sanction the specific complaint preferred before the Magistrate and that consequently it amounts in substance to a delegation of the authority vested in the Local Government. In support of this view, reliance has been placed upon the decision in *Barindra Kumar Ghose* v. *Emperor*[3]. In my opinion, there is no substance in this contention. In the case relied upon, sanction was granted for prosecution for offences under four sections specified and any other section of the Indian Penal Code which might be found applicable to the case. There was consequently a plain delegation of the controlling power and discretion vested in the Local Government. In the case before us, the persons to be prosecuted are named and the sections under which they are

[1] (1851) 3 H. L. C. 418. [2] (1886) 118 U. S., 425.
[3] (1909) I. L. R. 37 Calc. 467.

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alleged to have committed offences as also the period of their activity are specified. The mere circumstance that these persons are not described as members of the revolutionary society the existence whereof was sought to be established at the trial, does not affect the validity of the sanction. The second ground, therefore, cannot be supported.

In so far as the third objection is concerned, it has been argued by the learned counsel for the appellants that the conditions requisite for the initiation of a valid criminal proceeding are exhaustively enumerated in clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 190; that clauses (*b*) and (*c*) have no application to the present case; and that the requirement of clause (*a*) was not fulfilled inasmuch as what purported to be the complaint was not a complaint of the facts which constituted the alleged offence. My attention has been invited to the definition of the term "complaint" embodied in section 4(1) (*h*) of the Code, as the allegation, made orally or in writting, to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence. Reliance has also been placed upon the provisions of sections 200, 202, and 203 of Code to show that when a Magistrate has taken cognizance of an offence on complaint, he has to examine the complainant upon oath, to satisfy himself as to the truth of the complaint, to make an enquiry into the case or direct a local investigation for this purpose, if necessary, and then to determine whether he will dismiss the complaint for reasons to be recorded or issue process against the accused. It has been argued that in order to enable the Magistrate to exercise his judgment in this matter, it is essential that the complaint should be a complaint of the facts which constitute the offence, and that in the case before us, this condition has not been fulfilled. The complaints do not set out the facts. I shall take as an illustration the first of the three complaints on the record dated the 29th July 1910. The petition of complaint is headed as a complaint of offences under sections 121A, 122, 123 of the Indian Penal Code, and then proceeds as follows: "Your petitioner has reasons to believe that the persons named in the Government order dated the 26th July 1910, which is hereunto annexed, have amongst themselves and together with other persons known or unknown conspired to wage war against

His Majesty the King and to deprive His Majesty of the sovereignty of British India, and they have collected arms and have otherwise prepared to wage war with the intention of either waging war or being prepared to wage war against tha King, and have further concealed with intent to facilitate a design to wage war against the King, and have thereby committed offences punishable under sections 121A, 122 and 123, Indian Penal Code." It will be observed that no facts are set forth in the so-called complaint, but the words of the successive sections of the Code are literally copied out. In fact, the complainant might merely have stated that he complained that the persons named had committed offences punishable under sections 121A, 122 and 123 of the Indian Penal Code. In my opinion, a complaint of this description constitutes a merely colourable compliance with the provisions of the Statute. That substantial compliance with the statutory requirements may be secured without the least practical difficulty is clear from the form of the complaint in the case of *Emperor* v. *Nani Gopal*[1] which was produced before this Court, and which showed how a tolerably full statement of the concrete facts may be incorporated in the complaint so as to enable the Magistrate to discharge his judicial functions under sections 203 and 204 of the Criminal Procedure Code, and in the event of the issue of process under the latter section, to furnish indication to the accused of the outlines of the case for the prosecution. The view I take is founded not merely on the language of the Code [*Queen* v. *Sham Lal*[2]] but also on well-recognised principles which lie at the foundation of Criminal Jurisprudence. It is well-settled that in accordance with the general rule in criminal prosecutions, an indictment or information for conspiracy must contain a statement of the facts relied upon as constituting the offence, in ordinary and concise language, with as much certainty as the nature of the case will admit: *Rex* v. *Jones*[3], *Rex* v. *King*[4]. I am not unmindful of the view somtimes taken that where conspiracy is made a statutory offence, if the Statute sets out, fully and without uncertainty or ambiguity, the elements necessary to constitute the offence intended to be punished, a charge in the language of

[1] (1911) 15 C. W. N. 593, I. L. R. 38 Calc. 559.
[2] (1887) I. L. R. 14 Calc, 707 (716).
[3] (1832) 4 B and Ad 345.
[4] (1844) 7 Q. B. 782 (795).

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the Statute is sufficient: *R* v. *Rollands*[1]. But it is indisputable that if the Statute employs broad and comprehensive language descriptive of the general nature of the offence denounced, the complaint should embody a particular statement of the facts and circumstances: *R.* v. *Peck*[2], *Pettibone* v. *United States*[3], McClain on Criminal Law Vol. II section 984; Bishop on New Criminal Law, Vol. II section 202; Bishop on new Criminal Procedure, Vol. II, section 217. If the contrary view were maintained, we might as well hold that because sanction has been accorded under section 196 of the Criminal Procedure Code, the Magistrate need not execise his judgment at all,—a position clearly not intended by the Legislature. In my opinion, therefore, the complaint in this case was not a complaint of facts as contemplated by section 190 of the Criminal Procedure Code. The question thus arises, how far, if at all, the validity of the proceedings has been affected by this defective nature of the complaint. On behalf of the appellants, it has been contended that there was no complaint in the eye of the law and consequently the proceedings were without jurisdiction. In support of this proposition, reference has been made to the cases of *Umar Ali* v. *Safer Ali*[4], *Baidya Nath* v. *Muspratt*[5], *In re Subrao Ram Chandra*[6], *Runga Chari* v. *Emperor*[7], *Emperor* v. *Lalit Mohan*[8], *Barindra Kumar* v. *Emperor*[9], *Sham Khan* v. *Queen*[10], *Apurbi Krishna* v. *Emperor*[11] and *Lakenath* v. *Sanyasi Charan*[12], *Haladhar* v. *Sub-Inspector*[13], *Chamroo Sahu* v. *Emperor*[14], *Kesri* v. *Muhammad Bakhsh*[15], *Abdul Kader* v. *Emperor*[16], *Empress* v. *Alim Mundle*[17] and *Subrahmania* v. *Emperor*[18]. This position has been contested on behalf of the respondent, and it has been argued on the authority of the decisions in *Chidambaram* v. *Emperor*[19] and *Swami Dayal* v. *Emperor*[20],

[1] (1851) 17 Q. B. 671, 5 Cox. C. C. 466, 2 D. and H. C. C. 364.
[2] (1839) 9 A. and E. 686.
[3] (1892) 148 U. S. 197.
[4] (1886) I. L. R. 13 Calc. 354.
[5] (1886) I. L. R. 14 Calc. 141.
[6] (1898) Ranchoddas, 954.
[7] (1902) 2 Weir 241.
[8] (1910) 15 C. W. N. 98.
[9] (1909) I. L. R. 37 Calc. 467, 14 C. W. N. 1114.
[10] (1890) P. R. Crim 16.
[11] (1907) I. L. R. 35 Calc. 141.
[12] (1903) I. L. R. 30 Calc. 923.
[13] (1904) 9 C. W. N. 199.
[14] (1906) 11 C. W. N. 170.
[15] (1896) I. L. R. 18 All. 221.
[16] (1908) 5 M. L. T. 162.
[17] (1882) 11 C. L. R. 55.
[18] (1901) I. L. R. 25 Mad. 61.
[19] (1908) I. L. R. 32 Mad. 3.
[20] (1907) 7 Cr. L. J. R. 353.

that the defect, if any, may be deemed to have been cured by section 537 of the Criminal Procedure Code. Upon examination of the decisions to which reference has been made at the bar, it appears that not one of them is precisely in point; but one rule is deducible therefrom, *viz.*, that if the Court has acted without jurisdiction, the legality of the proceedings cannot be sustained. Now, it is plain that in the case of *Barindra Kumar* v. *Emperor*[1], where the order under section 196 of the Criminal Procedure Code did not mention section 121 of the Indian Penal Code, as also in the case of *Emperor* v. *Lalit Mohan*[2], where the complainant omitted to name an accused person in his petition of complaint, the defect went to the root of the matter and made it impossible for the Court to hold a valid trial for the offence not specified or of the accused person not mentioned. Again, where, as in the case of *Chawroo Sahu* v. *Emperor*[3], the validity of the complaint is successfully questioned before this Court, before the trial, the obvious course to adopt is to quash the proceedings as framed. In the case before us, however, the sufficiency or legality of the complaint has not been brought up to this Court for consideration before the completion of the trial in the subordinate Courts. On the basis of the complaint, the enquiry proceeded before the Magistrate, and after commitment by him, the Sessions Judge has elaborately tried the case with the aid of assessors. Under these circumstances, it is plainly no longer competent to the accused to invite this Court to set aside the convictions on the ground that the complaint was materially defective. A case of this description is, I think, completely covered by clause (a) of section 537 of the Criminal Procedure Code. There is no foundation for any possible suggestion that the essentially defective nature of the complaint has in fact occasioned a failure of justice. The essence of the argument for the appellants is that the complaint must embody a statement of facts, so as to enable the Magistrate to form an opinion whether he should take action under section 203 or section 204 of the Code. But that stage has been long since passed, and the Court is now called upon to decide, not whether the complaint should have been thrown out or acted upon, but whether the voluminous evidence on the record justifies

[1] (1909) I. L. R. 37 Calc. 467. [2] (1910) 15 C. W. N. 98.
[3] (1906) 11 C. W. N. 170.

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the convictions and sentences. The view I take is supported by the observations in the cases of *Swami Dayal* v. *Emperor* [1], and *Chidambaram* v. *Emperor* [2], though I do not adopt all that is said in these cases; in so far as the second case accepts the decision in *Queen* v. *Bal Gangadhar Tilak* [3], it cannot be reconciled with the decision in *Barindra Kumar* v *Emperor* [4], but that does not affect the point now under consideration. My conclusion, therefore, is that although the complaint is not in conformity with the requirements of section 190 of the Criminal Proceedure Code, and although the accused might have, possibly with success, applied to this Court to quash the proceedings at the appropriate stage, the convictions cannot now be assailed on this ground.

In support of the fourth ground, it has been contended that the trial is vitiated by misjoinder of charges, inasmuch as a charge under section 121A was coupled with a charge under section 123 of the Indian Penal Code. The contention in substance is that the same person connot be guilty of offences under the both the sections, and in support of this view reliance has been placed upon the decision in *Queen* v. *Raj Kumar Banerjee* [5], where it was ruled that the illegal concealment by act or omission contemplated by section 120 of the Indian Penal Code has reference to the existence of a design on the part of some third person other than the person who commits the offence. It has further been argued that if there was a misjoinder of charges, the trial has been altogether vitiated, because conducted in a manner not contemplated by law, and in support of this proposition, reliance has been placed upon the cases of *Queen* v. *Chandi Singh* [6], and *Subrahmanya Ayyar* v. *Emperor* [7], which must be taken to have overruled the decision of the Full Bench in *In re Abdur Rahman* [8]. In my opinion, there is no substance in the contention that the trial is vitiated by misjoinder of charges. In the first place, it is clear that the decision in *Barindra Kumar* v. *Emperor* [9], is opposed to the contention of the appellants. In the second place, it is manifest

[1] (1907) 7 Cr. L. J. R. 383
[2] (1908) I. L. R. 32 Mad. 3.
[3] (1897) I. L. R. 22 Bom. 112.
[4] (1909) I. L. R. 37 Calc. 467.
[5] (1862) I. Ind. Jur. O. S. 105.
[6] (1887) I. L. R. 14 Calc. 395.
[7] (1901) I. L. R. 25 Mad. 61. L. R. 28 I A. 257.
[8] (1900) I. L. R 27 Calc. 839.
[9] (1909) I. L. R. 37 Calc. 467 (493).

that the same person may be guilty of offences under section 121A as well as section 123 of the Indian Penal Code ; for instance, a person may bring himself within the latter section by concealment of the existence of a design to wage war against the King, and immediately afterwards join in the conspiracy to wage war against the King and thereby bring himself within the scope of section 121A. It is reasonably plain, therefore, that even if sections 234 to 238 of the Criminal Procedure Code are of no assistance to the prosecution, because, as explained in *Budhai Sheik* v. *Emperor* [1], they are limited to the case of a single accused person while section 239 applies to the joint trial of more than one person, yet the interpretation we put upon section 121A and section 123 of the Indian Penal Code shows that the trial is not open to objection on the ground of misjoinder of charges. See *Fanki* v. *Emperor* [2], which is not really in conflict with *Bishnu Banwar* v. *Empress* [3], and *In re Bal Gangadhar Tilak* [4]. In the second place, it is plain that the offences charged were committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code. But I must further add that the objection as to the joinder of charges proves wholly unsubstantial, also from another point of view. It appears that as soon as objection was taken on this ground before the Court of Session, application was made on behalf of the Crown for leave to withdraw the charges under sections 122 and 123 of the Indian Penal Code. The learned Judge, however, felt constrained to refuse this application in view of the decision in *Empress* v. *Poreshollah* [5], as also of the circumstance that there is no express provision in the Code which authorises the withdrawal of a charge in the events which have happened. The result was that the charges remained nominally unaltered ; but the prosecution directed the evidence towards the proof of the charge under section 121A alone. In my opinion, the application for withdrawal of the charges to which exception had been taken ought to have been allowed and the Court had inherent power to make the appropriate order. Criminal Courts, no less than Civil Courts, exist for the administration of justice, and Courts of both

[1] (1905) I. L. R. 33 Calc. 292.
[2] (1909) 11 C. L. J. 182.
[3] (1896) I. C. W. N. 35.
[4] (1908) I. L. R. 33 Bom. 221.
[5] (1880) 7 C. L. R. 143.

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descriptions have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of justice. From every point of view, therefore, the objection as to misjoinder of charges is unfounded and must be overruled.

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NOTE.

The first point raised and discussed was whether the sanction under section 196 Cr. P. Code given by the *de facto* Local Government was or was not sufficient for the validity of the trial. In deciding this point the learned judge referred to English, American and Indian cases and said. "The doctrine that the acts of officers *de facto* performed by them within the scope of their assumed official authority, in the interest of the public or third ersons and not for their own benefit, are generally as valid and binding as if they were the acts of officers *de jure*, dates as far back as the Yea- Books, and it stands confirmed, without any qualification or exception, by a long line of adjudications" (p. 574). For discussion on the Nature of Sovereignty see Bryce's *Studies in History and Jurisprudence*, Vol. II, Essay X and Sidgwick's *Elements of Politics*, Chap. XXXI and Appendix. In deciding the second point raised (*viz.* that the sanction given under section 196 by the Local Government was vague) the case of *Barindra* v. *Emperor* (1909) 37C.467 was distinguished. See page 578. The last ground of appeal was that the trial was vitiated by misjoinder of charges Section 537 Criminal Procedure Code should be read carefully and the distinction between "irregularity" and "illegality" should be carefully noted. In this case it was held by the court that the objection as to misjoinder of charges was unfounded. See also *Amritalal Hazra* v. *King Emperor* (1915). 21 C. L. J. at p. 344. For illegality of joinder of charges see *Subramania* v. *R.*, (1901) 28 I.A. 257 s. c. 25 M 61 referred to in 21 C L. J. 344. See also *Emperor* v. *Nagendra* (1915) 21 C. L. J. at p. 399.

BARINDRA KUMAR GHOSE AND OTHERS.

v.

EMPEROR.

[*Reported in I. L. R. 37 Cal. 467 s. c. 14 C.W.N. 1114.*]

The following is the judgment of Jenkins C.J. 1209

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* * * * * *

The next objection taken is that Barin being a European British subject the Magistrate was bound to commit him to the High Court in accordance with the provisions of section 447 of the Criminal Procedure Code, and that the rest of the accused should have been similarly committed in compliance with section 452.

Criminal proceedings against European British subjects are regulated by Chapter XXXIII of the Criminal Procedure Code, and provision is made in that Chapter for the tribunal before which a person answering that description can be tried and as to the sentence that may be passed. It is conceded by the Crown that it became apparent on the face of the proceedings in the course of the inquiry before the Committing Magistrate that Barindrakumar Ghosh was a European British subject, but it has been held that he waived his right to be treated as such. This, it is contended by Mr. Das, is erroneous.

Section 447 provides that: (i) When an European British subject is accused of an offence before a Magistrate, and such offence cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate shall, if he thinks that the accused ought to be committed, comit him to the Court of Session, or, in the case of a Presidency Magistrate, to the High Court."

(ii) "When the offence which appears to have been committed is punishable with death or with transportation for life, the commitment shall be to the High Court."

Section 449 (i) is in these terms: "Notwithstanding anything contained in section 31, no Court of Session shall pass on any European British subject any sentence other than a sentence of imprisonment for a term which may extend to one year, or fine, or both."

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Section 452 enacts that: "In any case in which an European British subject is accused jointly with a person not being an European British subject, and such European British subject is committed for trial before a High Court or Court of Session, such subject and person may be tried together, and the procedure on the trial shall be the same as it would have been had the European British subject been tried separately:

"Provided that, if the European British subject requires under section 450 to be tried by a mixed jury, or by a mixed set of assessors, and the person not being an European British subject requires that he shall be tried separately the latter person shall be tried separately in accordance with the provision of Chapter XXIII."

But then it is provided by section 453 that: (i) "When any person claims to be dealt with as an European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement, and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject, and shall deal with him accordingly. If any such person is convicted by such Magistrate and appeals from such conviction, the burden of proving that the Magistrate's said decision was wrong shall lie upon him."

(ii) "When any such person is committed by the Magistrate for trial before the Court of Session, and such person before such Court claims to be dealt with as an European British subject, such Court shall, after such further enquiry, if any, as it thinks fit, decide whether he is or is not an European British subject, and shall deal with him accordingly. If he is convicted by such Court and appeals from such conviction, the burden of proving that the Court's said decision was wrong shall lie upon him."

(iii) "When the Court, before which any person is tried, decides that he is not an European British subject, such decision shall form a ground of appeal from the sentence or order passed in such trial."

While under section 454 (i), "If an European British subject does not claim to be dealt with as such by the Magistrate

before whom he is tried or by whom he is committed, or if, when such claim has been made before, and disallowed by, the committing Magistrate, it is not again made before the Court to which such subject is committed, he shall be held to have relinquished his right to be dealt with as such European British subject and shall not assert it in any subsequent stage of the same case."

(ii) "Unless the Magistrate has reason to believe that any person brought before him is not an European British subject, the Magistrate shall ask such person whether he is such a subject or not."

On the strength of these sections, it is contended (i) that Barindrakumar Ghosh could only be committed to the High Court, (ii) that his co-accused too could only have been so committed, (iii) that there could be no waiver of a want of jurisdiction apparent on the face of the proceedings, (iv) that sections 453 and 454 could have no application where, as here, the status of European British subject is manifest and not open to doubt, (v) that there has been no waiver by Barindra, (vi) that if there was a waiver in fact, then it was not after he was made fully acquainted with all that he was giving up, and (vii) that in any case there was no waiver by his co-accused.

Though I recognise the force of Mr. Das' arguments, I hold that on the first four points we are concluded by the decision of a Bench of this Court in *In the matter of Quiros*[1], and I do not think what was then said can be regarded as mere *obiter dictum*. What is *obiter dictum* is sometimes difficult to decide, but a valuable guide to the solution of this difficulty is furnished by Lord Halsbury L. C. in *Watt* v. *Assets Co.*[2], at page 330, where he said—"When a learned Judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative, and when he distinguishes the case before him by pointing out there was no fraud, and, therefore, the fraud imputed did not exist, I very much doubt whether that is one of those things which can be described as a mere *obiter dictum*. It is part of the law which is guiding his judgment and part of the law he is bound to expound in the judgement he is pronouncing." In the light

[1] (1880) I. L. R. 6 Calc. 83.

[2] (1905) A. C. 317, 330.

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of these remarks, I am of opinion that what was said in the course of the judgement in *In the matter of Quiros*[1] is more than mere *obiter dictum*: it was an exposition of the law necessary for the judgment then pronounced. Moreover, what was then said has been repeatedly adopted as the basis of subsequent decisions; and we further find that since the judgment in *In the matter of Quiros*[1] the language on which it was based has been repeated in the Criminal Procedure Codes of 1882 and 1898, and this is a legislative recognition which we cannot disregard. In the light of this decision, I am of opinion that Barin could relinquish his right to be dealt with as a European British subject, and on the facts I hold that he actually did relinquish this right. From this it follows that the plea is of no avail either to Barin or his co-accused, and that the Court of Session had complete jurisdiction to dispose of the case.

It is next argued that there was no jurisdiction to take cognizance of the several offences of which the accused have been found guilty, that is to say, of offences under sections 121, 121A and 122 of the Indian Penal Code.

It is provided by section 196 of the Code of Criminal Procedure that no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code . . . . unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local-Government, or by some officer empowered by the Governor General in Council in this behalf. The authority in this case has proceeded from the Local Government. This objection has been taken on behalf of the appellants belonging to what has been called the first batch, against whom a complaint was preferred under the order or authority of the Local Government on the 17th of May 1908 (Exhibit 1). It is in these terms—"Whereas it has been made to appear to His Honour the Lieutenant-Governor of Bengal that there is reason to believe that during a period commencing from about the 16th October 1905 to date at Maniktollah (32, Muraripukur Road), Calcutta, and other places, the following persons have committed offences punishable under sections 121A, 122, 123 and 124 of the Indian Penal Code, Babu Purna Chunder Biswas, Inspector of Police,

[1] (1880) I. L. R. 6 Calc. 83.

Criminal Investigation Department, Bengal, is hereby ordered and authorised by His Honour the Lieutenant-Governor of Bengal, under the provisions of section 196 of the Code of Criminal Procedure, to prefer complaint against and to prosecute these persons, namely": [then after setting out a list of names in which are included the names of the appellants in the first batch, the document proceeds] "for the said offences under sections 121A, 122, 123, 124 of the Indian Penal Code, or under any other section of the said Code, which may be found to be applicable to the case.

By order of His Honour the Lieut.-Govr. of Bengal,

E. A. GAIT,

17th May, 1908. *Chief Secy. to the Govt. of Bengal.*"

On the 19th of May complaint was preferred in the form of an allegation made in writing to Mr. Birley, and after naming (amongst others) the appellants in the first batch, the complainant Purna Chander Biswas submitted his complaint "charging the members of the Secret Society under sections 143, 145, 150, 157, 121, 121A, 122, 123 and 124, of the Indian Penal Code." On the same day Inspector Purna Chander Biswas was examined on solemn affirmation on his complaint, and stated that sanction had been given to him by the Government of Bengal to prosecute certain persons under sections 121A, 122, 123, 124 of the Indian Penal Code. Then, after alleging that he complained against the 33 persons named in the Local Government's order and describing their several arrests, he proceeded in these terms :—"These persons are all accused of organising a gang for the purpose of waging war against the Government and overawing the Government by means of criminal force."

On the strength of this authority or order and complaint the Magistrate, after he had completed his enquiry, committed these appellants for trial to the Court of Session for offences under sections 121, 121A and 123 of the Indian Penal Code.

In the Court of Session objection was taken on behalf of the accused to the charge under section 121 of the Indian Penal Code, and thereupon Counsel for the prosecution informed the Court that he would file a fresh sanction, as he called it, in respect of that section, though he did not admit that the original

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sanction was insufficient. He subsequently produced what was described as a sanction given by the Local Government under section 196 of the Criminal Procedure Code, and in compliance with his applications the Court framed charges under sections 121 and 122 of the Indian Penal Code. The sanction here referred to was an order and authority in the terms of that of the 17th of May, which I have already cited, save that it mentioned section 121 of the Indian Penal Code in addition to the other sections set forth in the earlier authority. It was filed on the 19th of October, 1908.

Two points thus arise: *first*, was a complaint under section 121 of the Indian Penal Code authorised by the Local Government; and *secondly* was a complaint in fact preferred under that section?

Section 196 of the Criminal Procedure Code reserves to the Local Government the power of determining whether cognizance shall be taken by the Court of any offence punishable under Chapter VI of the Indian Penal Code except section 127. Seeing that this Chapter deals with offences against the State, the policy of this safeguard is manifest; the maintenance of this control is of the highest importance; and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether action should be under Chapter VI is more than a matter of law; considerations of policy arise, and these can only be determined by the authorities specially designated in the section.

It further appears to me to be the true implication of section 196 that the judgment of the Local Government should be specifically directed to the particular sections of Chapter VI in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of a deliberate determination that proceedings should be taken in respect of a perticular section or particular sections of the Chapter and no other.

It would, I think, be opposed to the true intendment of section 196 for the Local Government by its order to give its legal or other advisers a roving power to determine under what sections of the Chapter proceedings should be taken, and to abandon to them the discretion and responsibility that properly

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belong to itself; and I should hesitate to take a view of this section that might permit the Government to entrust to the zeal of an advocate, or of those by whom he may be instructed, the determination of the serious questions involved.

To turn from these general observations to the language of the order of the Local Government, can it be fairly said that it permits a complaint of an offence under section 121 of the Indian Penal Code?

This order was passed on the 17th of May, and at that time some of the most prominent of the persons arrested had made their confessions; and though the Local Government had not before it all the evidence that was afterwards adduced, it must have been aware of the facts on which reliance is now placed as constituting an offence under section 121. And yet the order does not specify that section. It recites that it had been made to appear to His Honour the Lieutenant-Governor of Bengal that there was reason to believe that the appellants (among others) had committed offences punishable under sections 121A, 122, 123 and 124 of the Indian Penal Code. It had not been made to appear that there was reason to believe that they had committed offences under section 121. Then, again, the order does not mention section 121, but only those specified in the recital. Can it in these circumstances be resonably contended that on a true reading of this order it was intended to cover section 121 of the Indian Penal Code? I think not. It is not as though this section had been overlooked, for it is the leading section of the Chapter and is concerned with the most serious offence of all. I cannot read the recital to the order without coming to the conclusion that it had not been made to appear to His Honour the Lieutenant-Governor of Bengal that there was reason to believe an offence had been committed under that section, nor can I suppose that this view was not the result of careful deliberation.

In the face of these facts, I decline to impute to the Local Government the sense of irresponsibility which is involved in the argument advanced by counsel that an authority was intended to be given in respect of an offence under section 121 which, in the view of that Government, there was no reason to believe had been committed. It is true that the order winds up with the words "or under any other section of the said Code

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which may be found to be applicable to the case." But found by whom? The order does not explain. It can hardly mean by the Court, as it relates to the complaint; and if it means found by anyone other than the Government, then it involves a delegation which cannot be sustained.

It is to be noticed for what it is worth that, in later documents, the Local Government expressly mentioned section 121, and that in his sworn statement which followed on the Local Government's order, it is distinctly said by the complainant that sanction had been given to the complainant by the Government of Bengal "to prosecute certain persons under sections 121A, 122, 123, 124, Indian Penal Code," and no suggestion is made of an authority to prosecute under section 121. Moreover, Mr. Norton, after his argument came to the notice of the Local Government, informed us that he was instructed to state that the Local Government did not desire him to argue that it was its intention to include section 121 of the Indian Penal Code in their order of the 17th May. For the foregoing reasons I hold that the order of the 17th of May did not authorise a complaint under section 121 of the Indian Penal Code.

But then it has been argued by Mr. Norton that any defect in the procedure of the Magistrate's Court has been cured by a sanction obtained from the Local Government while the case was before the Court of Session. But under section 196 the only order or authority within the competence of the Local Government is one that permits a complaint: the order actually passed was that there should be a complaint; and in fact it appears that no complaint was made. It is clear, therefore, that the so-called sanction on which Mr. Norton relied before the Court of Session, and has again relied here, is absolutely valueless.

Finally, it is contended that any defect in the commitment was cured by section 532 of the Criminal Procedure Code, and as authority for this, reference has been made to *Queen-Empress* v. *Morton*[1], *Queen-Empress* v. *Bal Gangadhar Tilak*[2]. The decision of *Queen-Empress* v. *Morton*[1] turned on a consideration of sections 197 and 532, and to appreciate what

[1] (1884) I. L. R. 9 Bom. 288. [2] (1897) I. L. R. 22 Bom. 112.

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was actually determined, regard must be had to the terms of the first of these sections, which differs materially from section 196. Section 197 makes the power of cognizance dependent on sanction, and the defect in *Queen-Empress* v. *Morton*[1] was that there was no sanction for the magisterial enquiry, so that, in committing the accused to the High Court, the Magistrate purported "to exercise powers duly conferred which were not so conferred." The High Court, however, had (apart from this defect) power to take cognizance of the offence, as before the trial the necessary sanction had been obtained.

Here, however, there has been a want of jurisdiction not only in the Magistrate, but also in the Court of Session, for at no stage have the conditions of section 196 been satisfied. It is true that in *Queen-Empress* v. *Bal Gangadhar Tilak*[2], a learned Judge holding the High Court Sessions in Bombay expressed an opinion that the decision in *Queen-Empress* v. *Morton*[1] was binding on him, though he was then concerned with a case to which section 196 was applicable. But it is to be noticed that this was the decision of a single Judge given in the course of argument and without adverting to the fundamental distinction between the two sections. To borrow the language of Sir Barnes Peacock in *Queen-Empress* v. *Nobodeep Chunder Gossamee*[3], the decision in *Queen Empress* v. *Bal Gangadhar Tilak*[2] was "in the nature of a *nisi prius* decision, by which Courts sitting in Banco do not consider themselves bound." Moreover, a different view has been taken of the position by a bench of the Punjab Chief Court in *Sham Khan's case*[4]. The result then is that the Court of Session had no jurisdiction to convict the appellants in the first batch under section 121. But I think it right to add that this conviction does not fail merely on the lack of jurisdiction, for on the merits too I should have held that no offence under that section has been proved.

In respect of the offences under sections 121A and 122 of the Indian Penal Code, I hold there was a good and sufficient authority under section 196 of the Criminal Procedure Code, and an earlier decision of a Bench of this Court furnishes an answer to the objection to the sufficiency of the signature of the

[1] (1884) I. L. R. 9 Bom. 288.
[2] (1897) I. L. R. 22 Bom. 112.
[3] (1868) 15 W. R. Cr. 71*n*, 73*n*.
[4] (1890) Punj. R., Cr. J. No. 16.

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Chief Secretary on the document containing the authority: *Apurba Krishna Bose* v. *Emperor* [1].

Though it was at the outset objected that the charges were bad for multifariousness, in the end this was not pressed, and I think rightly; for though the charges as ultimately framed are not happily expressed, I think on a fair reading of them they merely purport to place before the Court different aspects of the same transaction. And I further think we should be applying to the charges, as ultimately, framed, too strict a reading and too limited a meaning, if we were to give effect to Mr. Das' argument that the fourth head is limited to a conspiracy to wage a war which, according to the first head, had been already waged, or if we were to limit the fifth head by reference to the language of the fourth.

As in the view I take, the charge under section 121 cannot be sustained. Mr. Das' objection that he was not allowed to cross-examine the witnesses on the charges as re-framed falls to the ground, for on his own statement this objection would have no force in reference to the charge under section 121A, and it is with that section alone we are now concerned. I also hold that the objection to the proceedings on the ground of misjoinder of parties is not well founded and must fail.

Having thus disposed of the several objections to the legality of the present proceedings, I deal with the merits; but before discussing the details of the individual cases, it will be convenient to take up certain general questions that call for consideration and decision.

And, first, I will deal with the objection that the confessions are not admissible, for this involves a question of vital importance. As I have already said, Mr. Birley purported to record them under section 164 of the Criminal Procedure Code. But it is urged that they do not come within the terms of this section, that there is no other section of the Criminal Procedure Code that can be called in aid by the prosecution, and that, apart from the Code, there is no provision of law under which their admission can be justified.

For the law relating to confessions, we must first turn to the Evidence Act passed with a view to consolidating, defining

[1] (1907) I. L. R. 35 Calc. 141

and amending the Law of Evidence, of which the law as to confessions forms a part. The relevance of confessions is defined in that catena of sections which come under the general heading "Admissions," Section 21 declares that admissions are relevant and may be proved as against the person who makes them, and a confession is an admission. Sections 24 to 29 qualify the generality of this provision, and of these sections 25, 26, and 27 practically reproduce sections 148, 149 and 150 of the Criminal Procedure Code of 1861. As these provisions were incorporated in the Evidence Act, which received the Governor-General's assent on the 15th of March 1872: they naturally did not find a place in the Criminal Procedure Code of 1872, which received the Governor-General's assent on the 25th of the same month.

The Criminal Procedure Code of 1872, however, was not wholly silent as to confessions, for by section 122 it empowered a Magistrate to record confessions in the manner therein prescribed. This section roughly corresponds with section 164 of the present Criminal Procedure Code, by reference to which the present objection must be determined.

The objection to their admissibility under section 164 of the Criminal Procedure Code, rests first on the contention that, when they were recorded, the enquiry had commenced, and next, on the fact that the Magistrate who recorded the confession was the Magistrate before whom the enquiry was conducted and by whom the order of commitment was made. In support of this view, reliance is principally placed on the Full Bench decision in *Empress* v. *Anuntram Singh*[1] which, it is argued, supports the view that, at the time when Mr. Birley recorded the confessions, the enquiry had commenced, and that he could not in the circumstances record the confessions under section 164. The decision in *Empress* v. *Anuntram Singh*[1] was on section 122 of the Code of 1872, and it will, therefore, be necessary to compare the provisions of that Code with those of the present Code in order to estimate the extent to which that decision can be regarded as a controlling authority for the purposes of this case. First, then, I will examine the provisions of the Code of 1898 and consider their

[1] (1880) I. L. R. 5 Calc. 954.

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application, apart from authority, to the circumstances of this case. Section 164 provides that—

(1) Every Magistrate not being a police officer may record any statement or confession made to him in the course of an investigation under this Chapter, or at any time afterwards, before the commencement of the inquiry or trial.

(2) Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be enquired into or tried.

(3) No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect :—

I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Sd.) A. B.
Magistrate.

Therefore, to come within the scope of this section, a confession must be made either (i) in the course of an investigation under Chapter XIV, or (ii) at any time afterwards before the commencement of the enquiry or trial.

An investigation includes all proceedings under the Code for the collection of evidence conducted by a police officer [section 4 (*l*)], and there can be no doubt on the facts that the confessions in this case were made in the course of an investigation under Chapter XIV. But then, it is said that this is immaterial, as they were not made before the commencement of the enquiry. To this, however, the answer is that the condition requiring the confession to be prior to the commencement of the enquiry is only imposed when the investigation has ceased, and not when it is made in the course of the investigation.

This appears to me to be the true and natural meaning of this provision, which is a repetition of the provision to this effect contained in the Code of 1882, and I think this is none the less so because the punctuation in the Code of 1882 has not been retained. But even if it be assumed, for the sake of argument, that the commencement of the enquiry terminates the applicability of section 164, can it be said that on the 4th of May Mr. Birley had commenced the enquiry? To determine this we must have regard to the words of the Code. Chapter XV deals with the jurisdiction of the Criminal Courts in Inquiries and Trials: the first group of sections, that is, sections 177 to 189, deals with "Place of inquiry or trial:" the second group is headed "Conditions requisite for Initiation of Proceedings." Now section 190, which is the leading section of this group, indicates the conditions on which a Magistrate may take cognizance of an offence, that is to say, it may be (*a*) upon receiving a complaint, (b) upon a police report, or (*c*) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence had been committed. On the 4th of May there had been no complaint or police report, and the only information was received from Mr. Clarke, a police officer, who had taken part in the arrest, and possibly from Mr. Plowden, another police officer. But this information, being from a police officer, would not have justified Mr. Birley in taking cognizance, and it does not appear that he had any knowledge or suspicion apart from this information. It follows, therefore, that on the 4th of May none of those conditions had been satisfied on which alone cognizance could have been taken by Mr. Birley, and therefore the enquiry cannot then have commenced.

The necessary result of this train of reasoning is that the confessions in this case fall within the scope of section 164, if regard be had only to the words of the Code. But is there anything in the decided cases which precludes us from accepting this reading of the Act? Certainly not the case of *Empress* v. *Anuntram Singh*[1], for that was a decision on the Code of 1872, from which the words and provisions on which I have relied are absent. The same remark obviously applies to the

[1] (1880) I. L. R. 5 Calc. 954.

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decision in *Empress* v. *Yakub Khan*[1], which merely purports to follow the authority of *Empress* v. *Anuntram Singh*[2].

Moreover, it is to be noticed that in both those cases confessions were upheld on the ground that they did not come within section 122 of the Code of 1872, but within section 193, which, to some extent, resembles the present section 342. But words have been introduced into the present section which would make the decisions in those two cases impossible in these days. The decision in *Sat Narain Tewari* v. *Emperor*[3] has no bearing on the point I am now discussing, for there, in the opinion of the learned Judges, the Magistrate was carrying on an enquiry under section 202. Nor does *In the matter of Behari Hajdi*[4] throw any light on the present question. My conclusion, therefore, that the enquiry had not commenced is not disturbed by anything in the decided cases.

But then, it is contended that as Mr. Birley was the Magistrate who conducted the enquiry and ultimately committed the appellants, he had no jurisdiction to record the confession. This argument rests on the decisions in *Reg.* v. *Bai Ratan*[5], and *Empress* v. *Anuntram Singh*[2] cited above. But both these decisions were on the language of the Code of 1872, which materially differs from that of the present Code. It is now provided that "*every*" Magistrate may record a confession, the word "*every*" being substituted for "*any*" and there has also been added the Explanation—"It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case."

These alterations make it clear that it can no longer be contended, on the strength of the decisions in *Reg.* v. *Bai Ratan*[5] and *Empress* v. *Anuntram Singh*[2], that a confession recorded by a Magistrate who afterwards conducts the enquiry is outside the provisions of section 164.

In the view I take, it is unnecessary to consider whether, if the enquiry had actually commenced on the 4th of May, the confessions would have been inadmissible. The authority of *Queen-Empress* v. *Narayen*[6] is opposed to this view, and the present inclination of my opinion is that the argument seeks

[1] (1883) I. L. R. 5 All. 253.
[2] (1880) I. L. R. 5 Calc. 954.
[3] (1905) I. L. R. 32 Calc. 1085.
[4] (1879) 5 C. L. R. 238.
[5] (1873) 10 Bom. H. C. 166.
[6] (1893) Ratanlal's Unrep. Cr. Ca. 679.

to derive from the provisions of the Code a limitation on the law of confessions as defined by the Evidence Act for which there is no sufficient warrant.

Then, are the confessions vitiated by the fact that in some instances, and to some extent, the statements made were in response to questions? As far back as 1868 it was held by Sir Barnes Peacock in *Queen* v. *Nobodeep Chunder Gossamee*[1] that a statement made by a prisoner in answer to questions were admissible against him, and now we have statutory recognition of this view in section 29 of the Evidence Act. Therefore, the mere fact that a statement was elicited by a question does not make it irrelevant as a confession. It is to be observed that Ullaskar in effect invited Mr. Birley to question him, and that he should in the circumstances have complied with the request cannot call for any adverse comment.

I do not, however, intend to indicate that the fact of statements being elicited by questions may not be very material to an enquiry as to whether the confession is voluntary or not. On the contrary, there are circumstances in which it may be a most material fact, for, unhappily, not merely involuntary, but actually false confessions come before the Courts. Indeed, it may be a question whether such a confession has not come to light in the course of these proceedings, as it has been stated before us by Mr. Norton that, for one of the attempted outrages on the late Lieutenant-Governor, disclosed by the confessions in this case, certain coolies have been tried and convicted and are still in prison, part of the evidence against them being their own confessions. If the confessions in this case are true, then, as Mr. Norton has remarked, there may be reason to apprehend that those coolies have been improperly convicted. Mr. Norton, who appeared for the Crown in that case as well as this, has submitted that the Government should be moved by us to release those coolies. It is outside our province to investigate this matter, but no doubt it will be made the subject of careful enquiry by the Government, if this has not already been done, and the representation of counsel for the Crown will be brought to the notice of the Government.

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[1] (1868) 15 W. R. Cr. 71n.

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NOTE.

The Indian Evidence Act forbids, with some qualifications, the tendering in evidence of confessions made to the Police, but section 164 Criminal Procedure Code provides a means of obtaining a record made by a more responsible officer which can be without danger admitted in evidence. A Magistrate should be most careful in recording a confession under Sec. 164 to comply with all the directions set out in Sec. 164 and also in Sec. 364, for disregard of the law in this respect causes much labour and inconvenience to remedy defects, and such irregularities may cause a failure of justice. A confession recorded under Sec. 164 is made "in the course of an investigation," that is when the offence is under investigation by the Police and the case has not been placed before a Magistrate on termination of that investigation by the submission of his final report by the investigating police officer (Secs. 168-170). To come within the scope of Sec. 164 a confession must be made either (i) in the course of an investigation under Chap. XIV Criminal Procedure Code, or (ii) at any time afterwards before the commencement of the enquiry or trial. Sec. 37 Cal. pp. 496, 497. Jenkins C. J. in this case did not decide the point whether if the investigation and inquiry were actually simultaneous *i.e.* if the inquiry had commenced the confession would be inadmissible, but his Lordship was inclined to hold that it would still be admissible (37C. p. 498). A confession recorded under Sec. 364 would be in the course of judicial proceedings taken by a Magistrate, either in an inquiry or trial and after the matter is no longer in the hands of the Police. The provisions of Sec. 164 and of Secs. 342, 364 of the Procedure Code are not exhaustive, and do not limit the generality of Sec. 21 of the Evidence Act as to the relevance of admissions (37C. pp. 494, 513). "Although Sec. 29 of the Evidence Act expressly provides that a confession does not become irrelevant merely because it was made in reply to questions, no matter what their form, which need not have been answered, yet there can be no doubt that a process of examination may detract from the voluntary character of the transaction and that, where there is ground for thinking that there has been any such result, the confession is vitiated thereby [37C. p. 314 see also *Jogiban* v. *R.* (1909) 13 C.W.N. pp. 861, 881.] There is nothing in the present Criminal Procedure Code to incapacitate from recording a confession under Sec. 164 the Magistrate who intends eventually to try the person confessing (37C. at pp. 498, 513).) The old decision of the Full Bench of Calcutta High Court is now obsolete because of the legislative changes introduced by Sec. 164 of the present Criminal Procedure Code (37C. p. 498). On the question of validity of sanction under Sec. 196 Criminal Procedure Code see *Pulin Behari* v. *King Emperor* (1912) 15 C.L.J. pp. 517, 578.

The meaning of the expression "European British subject" should be noted because there is a special chapter in the Criminal Procedure Code (Chap. XXXIII) regulating Criminal proceedings against European British subjects. The special privileges granted by that chapter may be waived by such accused.

LEGAL REMEMBRANCER
v.
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[*Reported in I. L. R. 41 Cal. 173 s. c. 17 C. W. N. 1253=18 C. L. J. 452.*]

The Judgments of the Court were as follows :— 1913

Jenkins C.J. On the 12th of May 1913 Mr. Lionel Hewitt Colson, Special Superintendent, Intelligence Branch, Criminal Investigation Department, Indian Police Service, filed a petition of complaint in the Court of the Additional Magistrate at Barisal, alleging that one Girindramohan Das and 43 others had been guilty of offences under section 121A of the Indian Penal Code. The Magistrate, Mr. Nelson, examined the complainant on oath, recorded his deposition, and directed certain warrants to issue.

On the 19th, 20th, 21st, 22nd, 24th, 26th and 30th days of May, articles, it is said, containing comments on the criminal proceeding initiated by this complaint, described as the Barisal Conspiracy Case, were published in a newspaper called the *Amrita Bazar Patrika*.

The Government of Bengal, having been advised that the publication of these articles, and each of them, and in particular the leading article of the 22nd May, 1913, constituted serious contempt of Court, the Advocate-General, on the 6th of June, made an application to a Divisional Bench with a view to proceedings being taken against two persons on the ground that one of them was the editor and manager, and the other the printer and publisher of the *Amrita Bazar Patrika* newspaper.

The Advocate-General purported to apply on behalf of an officer of the Government of Bengal, whom he described as the Superintendent and Remembrancer of Legal Affairs and *ex-officio* Public Prosecutor, Bengal.

It appeared to the Division Bench that there might be a difficulty as to an application by the officer so described, and on this being brought to his notice, the Advocate-General stated to the Court that he was moving on behalf of His Excellency the Governor of Bengal in Council. Leave was accordingly

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given to the Advocate-General to move on behalf of the Governor of Bengal in Council and not of the officer described as Legal Remembrancer. An order was accordingly drawn up in the following terms :—"The Advocate-General of Bengal stating that he moves on behalf of His Excellency the Governor of Bengal in Council and at the instance of the Legal Remembrancer of Bengal, and that the matter is one of urgency, and further stating the facts on which he relies, all of which will be supported by affidavits, which he undertakes to file forthwith. It is ordered that, instead of issuing a Rule, special leave be given to serve notice of motion of the application for Wednesday, the 11th day of June instant at 11 o'clock in the forenoon, such notice to contain a general statement of the grounds. And it is further ordered that the said notice be forthwith served personally on Matilal Ghose, the editor and manager, and on Tarinikanta Biswas, the printer and publisher of the newspaper called the *Amrita Bazar Patrika* together with a copy of the petition, affidavits and exhibits and with a copy of this order." A notice of motion was prepared on the same date whereby an order was sought that "Matilal Ghose, editor and manager, and Tarinikanta Biswas, printer and publisher of the *Amrita Bazar Patrika* newspaper may be ordered to stand committed to prison for their contempt of Court in respect of the printing and publishing of articles which tend or are calculated to interfere with the due course and administration of justice."

The grounds are indicated at the foot of the notice of motion, and consist of a petition of the Superintendent and Remembrancer of Legal Affairs and three formal affidavits proving the presentation of the complaint, the purchase of the paper, and so forth. On the 11th of June, the day named for the hearing in the notice of motion, an adjournment became necessary as the notice had not been served on one of the respondents, owing to his absence from Calcutta, and the motion could not be brought on till the 18th.

A contempt of Court of the class with which we are now concerned is a criminal offence and no person can be punished for it, unless that offence be proved by legal evidence : *In re Pollard* [1]. I desire to make it clear at the outset that

[1] (1868) 5 Moo. N. S. 110 ; 16 E. R. 457.

I propose to deal only with criminal and not with civil contempt.

The affidavits in this case show no connection between Babu Matilal Ghose and the impugned articles, and all that there is suggestive of this connection is a statement in the petition on information and belief that he is the editor and manager. But a statement resting on information and belief is not legal evidence in a case like the present : *Queen* v. *Stanger* [1]. It was suggested by the Advocate-General that there was no denial by Babu Matilal Ghosh, but, as pointed out in the *Queen* v. *Stanger* [1], and indeed is obvious, a man in a criminal proceeding need not deny that which is not legally proved against him. Even in a civil proceeding, a statement on information and belief is not admissible, except on an interlocutory application, and then the grounds of such belief must be stated. There certainly was no admission by Babu Matilal Ghosh, for he had no time to file an affidavit by reason of the late service on him of the notice of motion, and it was stated before us that he was actually in a position to deny the allegation. The materials, therefore, necessary to fasten responsibility on him were wholly wanting. The suggestion on the part of the Advocate-General that we should at that stage permit further affidavits or evidence was opposed to the conditions on which alone he obtained leave from the Division Bench to serve notice of motion, as well as to the rules of this Court. Realising his difficulty, the learned counsel withdrew his motion as against Babu Matilal Ghose with the reasult that it had to be dismissed with costs.

The Advocate-General considered that his purpose would be sufficiently served if he could proceed against the printer and publisher, for he explained that there was no feeling against any particular individual, and what was desired was to obtain a decision whether the proceedings of inferior Courts could be protected by this Court on a summary application.

Had the case against the printer and publisher rested solely on the grounds furnished by those responsible for the motion it must equally have failed. But the application is saved from this by the second respondent's own admission, for, whatever may have been the view in days gone by, I think we can now take

(1) (1871) L. R. 6 Q. B. 352.

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that admission into consideration though contained in the affidavit in answer to the motion.

So we proceeded with the case against the printer and publisher, and to grant the further adjournment for which that respondent prayed, for we felt that it was time the case should be heard and decided.

The Advocate-General has contended that the articles justify the advice given to the Government of Bengal and described in these words in the 7th para. of the petition;—"that these articles and each of them and in particular the leading article of the 22nd day of May, 1913, in the circumstances aforesaid constitute a contempt of Court, in that the several articles severally and in conjunction are calculated and tend to interfere with the due course and administration of justice and that in particular and without prejudice to the generality of the foregoing the said leading article in the issue of the said newspaper, dated the 22nd of May, 1913, tends to interfete with the course of justice by influencing the minds of persons who may be concerned in the proceedings as Magistrates, assessors, jurors and witnesses". As a next step in his argument the Advocate-General maintained that the High Court had power to commit for contempt of the Court of a mofussil Magistrate.

Mr. Chakravarti for the printer and publisher accepted responsibility for the articles as printer and publisher, though his client, it is sworn, was not cognizant of them. He, however, repudiated the idea that the articles were intended to be, or were a contempt of any Court; he questioned our jurisdiction to commit for contempt of an inferior Court, and drew our attention to a series of blunders in the procedure, which he claimed, vitiated the proceedings.

There undoubtedly have been blunders which should not have found a place in so important an application. One has resulted in the dismissal of the motion with costs against one of the respondents at the very outset of the case. With that I have already dealt and I need not notice it further. That on which reliance has principally been placed on behalf of the printer and publisher—whose name, by the way, has been incorrectly given—is that the notice of motion is expressed to be on behalf of the

Superintendent and Remembrancer of Legal Affairs and *ex-officio* Public Prosecutor.

This is contrary to the condition on which leave to serve notice of motion was given, and the irregularity is the less excusable because this matter was discussed and determined at the time; and our order of the 6th June, expressly refers to and embodies the Advocate-General's statement that he moved on behalf of His Excellency the Governor of Bengal in Council. It was for such a motion and that alone that leave was granted. No leave was granted for the motion that has in fact been made. Nor is this all. The Advocate-General in his opening has asked us to act in the exercise of our Common Law powers in our original jurisdiction. This can only be on the Original Side of the Court, and it has been brought to our notice that the officer described as the Legal Remembrancer is not authorised to represent the Government on the Original Side of the Court. More than that, it has been contended that, at the time when the Advocate-General obtained leave, his appearance before us was unathorised, as he was not instructed by an attorney, and in fact the warrant of attorney was not filed until some days later.

The existence too of such an officer as "a Superintendent and Remembrancer of Legal Affairs and *ex-officio* Public Prosecutor, Bengal" has been questioned, and reference was made to Regulation IX of 1793, Regulation VIII of 1816 and Regulation XIII of 1829.

By way of reply certain Government notifications were brought to our notice. But in the events that have happened it is unnecessary to pursue this topic further. Both sides being anxious to have a decision on the merits, we have permitted an amendment that would regularize these proceedings and bring them into conformity with the order of the 6th of June. The necessary authority for this has now been obtained in the required amendment will be treated as made, as though His Excellency the Governor in Council were added as an applicant.

Have we then jurisdiction to commit for contempt of an inferior Criminal Court? The question is one of considerable difficulty and cannot, as seemed to be supposed, be solved or even understood by a mere perusal of the decision in

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Surendranath Banerjee v. *Chief Justice and Judges of the High Court*[1] and *Rex* v. *Davies*.[2]

To determine the High Court's jurisdiction in this matter involves an enquiry into its constitution and the jurisdiction, power and authority it has inherited, or may otherwise possess, though there was nothing in the argument in support of the motion to indicate that any consideration had been given to this aspect of the case.

By the Indian High Courts Act (24 and 25 Vict. c. 104), Her Majesty was empowered by Letters Patent to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William. It was provided by Section 8 that upon the establishment of such High Court, the Supreme Court and the Court of Sudder Dewani Adawlut and Sudder Nizamut Adawlut should be abolished, and that the records and documents of the several Courts so abolished should become and be records and documents of the High Court.

By section 9 it was enacted that "The High Courts to be established under this Act should have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, Original and Appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty might by Letters Patent grant and direct, subject, however, to such directions and limitations as to the exercise of Original, Civil and Criminal Jurisdiction beyond the limits of the Presidency town as might be prescribed thereby: and save as by such Letters Patent might be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council the High Court should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the courts abolished under this Act at the time of the abolition of such last mentioned courts." Section 15 provided that the High Court should have superintendence over all courts which might be subject to its appellate jurisdiction.

[1] (1883) I. L. R. 10 Calc. 109. [2] (1906) 1 K. B. 92.

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In 1862, the Letters Patent were granted and thereby Her Majesty did erect and establish a High Court at Fort William and constituted the same to be a Court of Record (clause I). By these Letters Patent, the High Court was vested with Civil and Criminal Jurisdiction both Original and Appellate. For the present purpose it is only necessary to refer to clause 26, whereby it was ordained that the High Court should be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other courts whether within or without the said Bengal Division from which there was then an appeal to the Court of the Sudder Nizamut Adawlut, and should exercise appellate jurisdiction in such cases as were subject to appeal to the said Court of Sudder Nizamut Adawlut or should become subject to appeal to the High Court by virtue of such laws and regulations relating to Criminal Procedure as should be thereafter made by the Governor-General in Council. Clause 27 provided for the hearing of referred cases and the revision of criminal trials.

By the Letters Patent of 28th December, 1865, the Letters Patent of 1862 were revoked, but it was directed that notwithstanding such revocation the High Court of Judicature should be and continue as from the time of the original erection and establishment thereof the High Court of Judicature at Fort William and should be and continue a Court of Record.

Clauses 27 and 28 empower the High Court to hear appeals from Criminal Courts in the provinces and also references and revisions of criminal trials. Thus the High Court inherited all jurisdiction and every power and authority in any manner vested in the Supreme Court, the Sudder Dewani Adawlut, or the Sudder Nizamut Adawlut.

The Supreme Court was established by Charter dated the 26th March, 1774, granted under 13 George III c. 63 and it was thereby constituted a Court of Record (clause 2).

By clause 4 it was ordained as follows :—"And it is our further will and pleasure that the said Chief Justice and the said Puisne Justices, shall severally and respectively be and they are all and every of them hereby appointed to be Justices and Conservators of the Peace and Coroners, within and throughout the said provinces, districts and countries of Bengal, Behar, Orissa and every part thereof ; and to have such jurisdiction

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and authority as our Justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England by the Common Law thereof; and we further will and ordain that all judgments, rules, orders and acts of authority, or power whatsoever, to be made or done by the said Supreme Court of Judicature at Fort William in Bengal shall be made or done by and with the concurrence of the said four Judges or so many or such one of them, as shall be on such occasions respectively assembled or sitting as a court, or of the major part of them so assembled and sitting; provided always, that in case they shall be equally divided, the Chief Justice or in his absence the senior Judge present shall have a double or casting voice."

By Clause 21 the Court of Requests and Court of Quarter Sessions erected and established at Fort William, and the Justices, Sheriffs and Magistrates appointed for the said districts were made subject to the order and control of the Supreme Court in such sort, manner and form as the inferior courts and Magistrates of and in England were, by law, subject to the order and control of the Court of King's Bench, and to that end the Supreme Court was empowered to issue writs of *mandamus*, *certiorari*, *procedendo* or *error* to be directed to such Courts or Magistrates as the case might require and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment.

It is a sufficiently accurate statement for the purpose of this case to say, that, as the result of this and subsequent legislation, the criminal jurisdiction of the Supreme Court (apart from crimes maritime) was limited to the local limits except as to British subjects, and the Court had no general control or power over mofussil criminal courts. The Common Law was similarly limited in its application to the Presidency towns and to British subjects outside the local limits.

The jurisdiction of the Sudder Dewani Adawlut need not be considered. It is true that under 21 George III.c. 70,s. 21, it was constituted a Court of Record, as the result, according to tradition, of insistence by the Chief Justice and Judges of the Supreme Court for a reason peculiar to their relations with the Sudder Dewani Adawlut. But as its jurisdiction was civil, the powers inherited from this Court are of no assistance

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in this case. It only remains then to see what was the position of the Sudder Nizamut Adawlut, or the final court of criminal appeal from the mofussil. Its earlier history is set out in the preamble to Regulation IX of 1793. At that date it consisted of the Governor-General and Members of the Supreme Council assisted by the head *kazee* and two *mooftees*.

By Regulation II of 1801 §3, its constitution was altered, and thenceforth the court was to consist of three judges.

In the course of time the same Judges presided over the Sudder Nizamut Adawlut and the Sudder Dewani Adawlut, but the two courts were distinct. I have been unable to discover any statute which made the Sudder Nizamut Adawlut a Court of Record, nor can I find any indication that it was so regarded. Every Court of Record is the King's Court and all such Courts are created by Act of Parliament, Letters Patent, or prescription (*see* Bacon's Abridgement, Vol. II, p. 392; Stephen's Commentaries Vol, III).

Not only then is there nothing to show that the Nizamut was created a Court of Record by Act of Parliament, Letters Patent or prescription, but it is not a King's Court, being only a Company's Court, and in theory derived its jurisdiction and authority, not from the British Crown, but from the country Government in whose name the Company acted. (See Ilbert's Government of India, 1st Edition, page 46).

But if it was not a Court of Record, then it is difficult to see what power it could have had to commit. *McDermott* v. *Judges of British Guiana* [1], *Kochappa* v. *Sachi Devi* [2].

This view is fully borne out by a circular order of the Sudder Nizamut of the 3rd of February, 1843, to be found in the collection of orders brought out by Mr. J. Curran. It appears from that order that it was brought to the notice of the judicial authorities that Act XXX of 1841 was the only law under which contempt of court could be punished.

Act XXX of 1841 is an Act for repressing obstructions to justice in certain courts, of the East India Company, and by §I it is enacted that all persons using menacing gestures or expressions or otherwise obstructing justice in the presence of any Zilla or City Magistrate, Joint Magistrate or other officer

[1] (1868) L. R. 2 P.C. 341. [2] (1902) I. L. R. 26 Mad. 494.

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under a Magistrate empowered to try a civil case, or any superior or inferior court, civil or criminal of the East India Company, shall be liable to be fined by the authority whose proceedings are obstructed, to any amount not exceeding Rs. 200, or, in case such fine be not paid, to be imprisoned for any period not exceeding one month. This was followed by a proviso that notwithstanding anything in the Act, it should be lawful to indict any person amenable to Her Majesty's Supreme Court, as for a misdemeanour in any of the cases aforesaid sustainable before this Act, if no proceeding shall have been had aganist the offender in the court where the offence was committed but not otherwise. This then shows that the power to commit was only for contempt in the face of the court, that the punishment was in the first instance fine, that the punishment was to be inflicted by the authority whose proceedings were obstructed, and that no power was vested in the Sudder Nizamut to punish for contempt of an inferior court.

This then would seem to have been the position prior to the establishment of the High Court. The Supreme Court would have had no jurisdiction to protect a mofussil Criminal Court by summary proceedings in a case like the present. The matter would have been wholly outside the authority of the Sudder Dewani Adawlut. And though the Sudder Nizamut had a power of superintendence over the mofussil Criminal Courts, it had not any power to commit for contempt of those Courts.

If that be so, the jurisdiction now invoked cannot have been inherited from any of the three abolished courts.

So it has to be seen whether it became vested in it by the Charter Act of 1861 or the Letters Patent under that Act.

So far as this Presidency is concerned the application is novel and the case is one of first impression.

It is argued, however, that the decision in *Rex* v. *Davies* [1], and the decision in *In re Venkat Rao* [2] are authorities on which we ought to act. This has been vigorously controverted by Mr. Chakravarti.

Rex v. *Davies* [1] came before the King's Bench Division on a rule for a writ of atttachment for contempt of court. This

[1] (1906) 1 K.B. 32.

[2] (1911) 21 Mad. L. J. 832.

contempt consisted of the publication of articles in a newspaper calculated to give an exceedingly unfavourable impression of a prisoner, who had been arrested and brought before the Magistrate. The publication was while the case was still before the Magistrate and prior to committal. It was held that the High Court had power to attach, first, because the case might come to the assizes for trial, and secondly, because, even if the committal had actually been made to the quarter session, still the King's Bench Division, as the inheritor of all the jurisdiction and powers of the Court of King's Bench, possessed this summary power of punishment.

It was on the second of these two grounds that the Advocate-General relied in his opening.

This phase of *Rex* v. *Davies*[1] demands close attention in order to see whether it rests on reasoning which can legitimately be applied here. Certain links in that chain of reasoning are evident: others perhaps are not so clear.

First then, the jurisdiction assumed in *Rex* v. *Davies*[1] was inherited, if at all, from the old King's Bench and not from the other Courts of Record which became amalgamated in the English High Court, though those courts too had the power to commit for contempt of themselves that belongs to every superior Court of Record.

Next, this jurisdiction inherited from the Old King's Bench was of a special character, and, unless I had misread the judgment, it rested on that Court's power to punish every kind of misdemeanour, in that it was, in a special manner, the guardian and protector of public justice throughout the kingdom, the "custos morum", a dignity that reverted to it or was revived on the abolition of the Star Chamber by 16 Char. I c.10. Ordinarily misdemeanour was punishable by indictment or information, but when it was a contempt of Court it was also punishable "brevi manu" by attachment. When this summary proceeding was first used is in some doubt; but the opinion has been expressed that the earliest instance of its use, where the contempt was an attack on a Judge not in the face of the Court, was in 1720.

The fact that there was an alternative mode of bringing the offender before the Court where the misdemeanour was a

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contempt of court was merely a difference of procedure; the subject-matter was the same, that is to say, the prosecution of an offence in the Court of King's Bench.

The helplessness of the inferior Court and its subjection to the superintendence and control of the King's Bench were not the foundation of the jurisdiction, but merely the occasion and the reason for its exercise.

This is made clear by the essential difference between the jurisdiction exercised by the Court of the King's Bench and that exercised by the other superior Courts of Record which possessed no relations with the inferior Courts, a difference that relates both to the foundation and object of the jurisdiction. And it is important here to note that the learned Judges seem to have thought that it would be within the jurisdiction of the King's Bench to punish as an offence any improper interference with the administration of justice in the superior Courts, and that the reason why the Court of King's Bench did not concern itself with contempts of the other superior courts was that they possessed ample means and occasions for protecting themselves.

On these grounds the Court arrived at the conclusion that the proceeding before it was nothing more than the legitimate application to new circumstances of the old principles of the Common Law.

Those principles of the old Common Law must, I think, be that the Court of King's Bench as the "custos morum" had jurisdiction to punish on a summary proceeding as well as on indictment or information all offences in the kingdom being a contempt of Court as tending to interfere with the administration of justice. When the Court so impeded or embarrassed was an inferior Criminal Court, unable to protect itself but under the superintendence and control of the Court of King's Bench, the case was one in which it would be right that the Common Law principles should be applied on a summary proceeding.

Have we then these powers? Has this High Court Common Law powers that would enable it to punish as an offence, on a summary proceeding, conduct in relation to a proceeding in a mofussil Criminal Court and not in the face of that Court, such conduct not being an offence under the Indian Penal Code, Act XLV of 1860? The preamble of this Act shows it was

intended to be a general Penal Code for British India, but it contains no specific repeal of the penal laws then in force. This was intentional, as it was considered possible that some offences might have been omitted which it would not be intended to exempt from penal consequences. Not only the facts with which we are concerned do not amount to an offence under any Act passed after the Indian Penal Code, but I cannot find that they would have been an offence under the criminal law in the mofussil prior to the Code. And here I may again refer to Act XXX of 1841.

It is conceivable that there might be facts which would constitute an offence in the nature of a contempt of an inferior Court within the limits of the High Court's Original Jurisdiction, as being a misdemeanour under the Common Law, and that it could be punished on a summary proceeding, but that would be of no help, as I am now considering whether what has been done could be punished by the High Court on a summary proceeding as a contempt of the Magistrate's Court at Barisal.

I have already pointed out that by clause 21 of the Charter of 1774, inferior criminal courts and Magistrates were made subject to the order and control of the Supreme Court "in such sort, manner, and form as the inferior courts and Magistrates of and in England are by law subjects to the order and control of our Courts of King's Bench." And I would recall that to this end the Supreme Court is expressly empowered and authorised only to award and issue a writ or writs of *mandamus*, *certiorari*, *procedendo*, or *error* to be directed to such courts of Magistrates as the case may require and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment.

This is not without its bearing on the question whether it is open to this court to adopt the extended application of common law principles sanctioned by *Rex* v. *Davies*[1].

The relations between the Supreme Court and the inferior courts of the Presidency town does not rest on the adaptable foundation of the Common Law, but on the Acts and Charter, and it certainly is a question whether this Code, so constituted did not crystallize these relations and the consequences to

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which they could give rise. It may be that the authors of the Charter did not anticipate the development expounded in *Rex* v. *Dvaies*[1]. And they were lawyers of no slight eminence, for it is a matter of history that the original draft was perused by the Attorney-General, who afterwards became the Lord Chancellor, Lord Thurlow, was altered by the Solicitor-General, who afterwards became the Lord Chancellor, Lord Loughborough, and was revised by the Chief Justice of the Common Pleas, and by Earl Bathurst, then the Lord Chancellor of England. Its parentage therefore was above reproach.

But however that may be, the Courts and Magistrate which are indicated in clause 21 are those, not of the mofussil but of the Presidency town, and I am not aware of any statutory jurisdiction possessed by the Supreme Court over mofussil Magistrates except as provided in 53 George III c. 155, or in relation to offences against them (if I may use that phrase) except to the extent indicated in Act XXX of 1841.

It is true that the High Court not only has superintendence over the courts of mofussil Magistrates, but also is a Court of Record; if I am right, however, in my reading of *Rex* v. *Davies*[1], superintendence does not give jurisdiction, while the power of the King's Bench to punish for interference with the lower court did not arise from its being a Court of Record but from its Common Law powers as *custos morum*. I have studied as best I could the decision in *In re Venkat Rao*[2]. But to appreciate the *ratio decidendi* in that case it would be necessary to possess an intimate aquaintance with the nature and limits of that Court's jurisdiction inherited from its predecessor or vested in it by its present Charter. None of the materials necessary for this purpose have been placed before us, nor have I been able to discover how far the English Common Law prevails in that Presidency outside the Presidency town. This limits the assistance I have been able to derive from this decision.

For the reasons I have expressed I think the ground on which the Advocate-General founded his claim in his opening speech fails. And I may here point out that this would hardly have been a satisfactory basis for the jurisdiction invoked, as it

[1] (1906) 1 K. B. 32. [2] (1911) 21 Mad. L. J. 832.

would be of use only where the Common Law prevails. A jurisdiction so founded would, as far as I can see, be of no use to the High Court of Allahabad, to any High Court established under the recent Act, or to any of the Chief Courts, but would belong only to the three High Courts which are vested with Common Law powers.

But it was indicated to Mr. Chakravarti by the Court in the course of his argument that we would desire him to consider whether this Court could not, as a Court of Record, commit for contempt on what I have already described as the first ground in *Rex* v. *Davies*[1], that is to say on the ground that there was an independent contempt of this Court as distinct from the inferior Court, inasmuch as the case might come before this Court either for original or appellate trial at one stage or another. In the ordinary course of criminal procedure the case would not come before this Court for original trial. It might be transferred here by an order of the High Court on special grounds, but there is nothing before us to show that they exist. It migst also come before this Court under the Indian Criminal Law Amendment Act, 1908; but this could only be, if it appeared to the Governor-General in Council or to the Local Government, that in the interests of peace and good order the provisions of Part I of the Act should be made to apply. Here again there is nothing before us to indicate that it does so appear to those authorities. For the purpose in hand I think we should disregard remote possibilities and act upon the assumption that the normal procedure will be followed. And in support of this I may recall the fact that though counsel in *Rex* v. *Davies*[1] relied on the possibility of removal of the case into the High Court by *certiorari*, it was apparently not regarded as deserving of notice in the judgment. I therefore put aside the contingency, which on the materials before us is remote, of the case coming before this Court on original trial.

But it may come before us on appeal, either at the instance of any person convicted (Criminal Procedure Code section 410), or conceivably though not probably, at the instance of the Local Government in the event of an acquital (section 417 of the Code). If the appeal were by the accused, the result of the trial would go to show that there had been no serious

[1] (1906) 1 K. B. 32.

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interference with the course of justice to the prejudice of the prosecution.

Now this Court is a Court of Record in all its jurisdictions, and it thus has power to commit for any contempt in relation to any of those jurisdictions: *In re Abdool and Matab.*[1]

Thus I have no doubt that were there to be an interference with the due administration of justice by a Division Bench in relation to a criminal appeal pending before it, and that interference amounted to an offence, this Court on its Crown side would have power to punish it as a contempt on a summary proceeding.

And I would go further and say that it might be cogently argued that there was this power even before the appeal was pending before this Court, but to avoid possibility of misunderstanding I again emplasize this would be on the ground that the contempt was of this Court and not of an inferior court.

I have expressed myself thus guardedly as the matter is one of some difficulty, and it has not been discussed in the course of the argument. It may be, if the matter ever comes up for consideration, that convincing objections could be urged against this more extended jurisdiction. Nor can I overlook the fact that where a contempt in relation to an English County Court was under consideration, it was said by Mellor, J., in *Queen* v. *Lefroy*[2] that what might be called contempt out of court was left to be punished by the general law of the land by indictment or otherwise. Similarly Cave J., delivering the judgment of the Court in *Queen* v. *Brompton C. C. Judge*[3] expressed the view that contempt of a County Court Judge was punishable by indictment and not summarily. And though an appeal lay from the County Court to the High Court, there was no suggestion that the High Court on that ground had power to punish summarily for contempt of itself. I do not attach so much importance to the fact that no reference is made in *Rex* v. *Davies*[4] *or Rex* v. *Clarke*[5], to the fact, that the case might come before the High Court otherwise than on committal for trial, for that result would not be in the ordinary course.

[1] (1867) 8 W. R. Cr. 32.
[2] (1873) L. R. 8 Q. B. 134.
[3] [1893] 2 Q. B. 195, 200.
[4] (1906) 1 K. B. 32.
[5] (1910) 103 L. T. 636.

In saying this I do not forget that *Rex* v. *Clarke*[1] was subsequent to the establishment of the new Court of Criminal Appeal, but it is to be noticed that this Court was established in 1907 as a district Court, for though the presiding Judges are selected from the Judges of the King's Bench Division, it does not appear clear that it is an integral part of the High Court. I feel the more justified in leaving this precise question open, for I am convinced that, even if what I have described as the more extended jurisdiction in relation to contempt of this Court exists, no ground has here been shown for its exercise.

At the outset it has to be borne in mind that what might have been a contempt of the inferior court would by no means necessarily be a contempt of this Court. Thus an attack upon the Magistrate, any endeavour to corrupt him, or any direct obstruction of his proceedings would not, speaking generally, be a contempt of this Court.

And the only way in which it could be contended, in the circumstances of this case, that there had been a contempt of this High Court, would be perhaps by showing that witnesses had been attacked, deterred and frightened, to use the language of Blackburn J., in *Skipworth's Case*,[2] or in some manner dissuaded, hindered or prevented from giving evidence.

After careful and repeated consideration of the impugned articles, I come unhesitatingly to the conclusion that, whatever censure they may merit, they do not come under that particular censure.

The Advocate-General has taken us through the articles in minute details and has represented to us with insistence that in some respects their culpability could hardly be exceeded. He appears to me to have formed an exaggerated notion of their effect.

If the whole series of articles be read, it will, I think, be found that the more prominent topics are (i) remonstrance against universal house searches, (ii) protests against the harsh treatment of those arrested, (iii) deprecation of methods attributed to the police, (iv) requests that the case should not be tried before a Special Magistrate, and (v) an appeal to the recognised fairness of the Government, accompanied with some

[1] (1910) 103 L. T. 636.

[2] (1873) L. R. 9 Q. B. 230, 232.

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measure of advice. In the course of discussing these topics expressions are used here and there to which exception has been taken.

No suspicion of contempt of this Court is to be found in the 1st, 2nd, and 5th of these topics even if there be involved in them what appeared to the Advocate-General to be the inexcusable presumption of offering advice to the higher authorities. The 4th topic, that is, the request that the accused should not be tried before a Special Magistrate and the assertion that a conviction by him would not command public confidence, show that the writer knew very little about what he was discussing, but this I believe sometimes happens even in journalism. He might as well have protested againat trial by court martial. The case could not be tried, and the accused could not be convicted by a Special Magistrate; their trial in the normal course could only be before a Sessions Judge sitting with assessors, and against such a tribunal not a word has been said. Nor could the writer have possibly meant that the enquiry should not be before a Magistrate, as that is the only tribunal, before which it could be held. But apart from all this, there is nothing in the discussion of this topic that is in any degree a contempt of this Court.

There only remains the third topic, the deprecation of methods attributed to the police. It is no part of our duty to reprehend that which cannot properly be the subject of legal censure. Still I do strongly feel that indiscriminate attacks on this force are themselves to be deprecated. Where definite misdoing is established, by all means condemn with all emphasis the misdoer and his misdeed. But general abuse merely defeats its own end, for it is the tendency of men to become what they are depicted.

No doubt a distrust of the police is expressed, but however underserved it may be, it is, I think, too sensitive a mind which would perceive in the article a contempt of this Court. There is no denial of guilt, on the contrary the wish is expressed that the guilty should be arrested and punished. And I am unable to hold that witnesses would be deterred from giving evidence by reason of this attack on police methods or of anything contained in the articles. I have examined and re-examined the articles to see if they could

reasonably produce this consequence, but I come without doubt to the conclusion that they could not. And indeed this was not the principal attack made on them in argument.

I purposely refrain from quoting the articles, or extracts from them, at length, for it would serve no useful purpose, but there are one or two passages to which I must refer because they have been made the subject of special animadversion by the Advocate-General. In the article of the 22nd of May there is the following passage : "Why should the defendants in the present case, at least such of them against whom there is no positive evidence, be handcuffed or refused bail and made to rot in jail before they have been found guilty." Here, it is said, is an assertion that against some of the accused there is absolutely no evidence.

To begin with, that is not what was written ; there is a surmise that there may be some accused against whom there is not *positive* evidence. The Advocate-General repudiated the idea that the word "positive" could qualify or really narrow the character of the evidence. I was surprised at this suggestion, and I find I was fully justified in such surprise, for there is very high authority for the view that "positive evidence" has a recognised and distinct signification and that it means evidence "which goes expressly to the very point in question ; and that which, if believed; proves the point without aid from inference or reasoning as the testimony of an eye-witness to an occurrence as distinguished from indirect or circumstantial evidence."

The surmise therefore has not the sinister meaning ascribed to it ; and moreover some regard must be had to the obvious purpose of the sentence, and to the topic of which it forms a part. It is not suggested that in no case should the accused be put on their trial ; on the contrary it is expressly said that if His Excellency is convinced that a *prima facie* case has been made out, the accused must stand their trial. The suggestion as to His Excellency is condemned, but after all, this is substantially only what the law provides, for a Court cannot take cognisance of any offence punishable under Chapter VI of the Indian Penal Code unless upon complaint made by order of, or under the authority, from (amongst others) the Local Government, or in other words, the Governor in Council (Criminal Procedure Code, section 196).

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It need hardly be said that the Governor in Council would not make this order or grant this authority unless he had reason to believe that a *prima facie* case had been made out.

The conclusion then to which I come is, that though we may have jurisdiction to commit for contempt of the High Court in a case of this class, still in the present case no contempt justifying summary action on our part has been established.

As the contempt of inferior Courts has been so much under discussion in this case, I would take this opportunity of urging, as earnestly as I can, the propriety of abstaining from comment on pending cases in whatever Court they may be, or whatever stage they may have reached. The responsibility of a judicial tribunal is at all times great, and I do not think I ask too much when I ask in the interests of judicial officers working in the mofussil districts of this Presidency, that the weight of that responsibility should not be increased, however unwittingly, by comments on the cases before them, or on themselves in connection with those cases. I am tempted here to quote the words of Blackburn J., in *Skipworth's Case* [1] where he haid: "It is not right that a Judge * * * * * when personal attacks are made on him, should come forward and meet them and explain them, and that is well known to those who make the attack, and certainly that knowledge does in my mind render the conduct of those who attack a Judge in that way, to use the mildest term, neither just nor decorous." The learned Judge was speaking of those who could in some measure protect themselves: how much more forcibly do his words apply to those who have not that power.

Then this motion raises a question of high importance, which it would not be right for me to pass by without remark. I allude to the question—what circumstances ordinarily justify recourse to this summary process of contempt.

It is not enough that there should be a technical contempt of Court: it must be shown that it was probable the publication would substantially interfere with the due administration of justice.

[1] (1873) L. R. 9 Q. B. 230, 237.

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And there is good reason for this: what is charged is a criminal offence, and the trial is not in accordance with those safeguards that the ordinary procedure for the trial of a criminal offence requires but by way of summary proceeding. Lindley L. J. declared in *O'Shea* v. *O'Shea and Parnell* [1], that this was the only offence of which he knew, that was punishable at Common Law by summary process.

It is therefore no matter for surprise that the cases are full of warnings that this arbitrary, unlimited and uncontrolled power should be exercised with the greatest caution; that this power merits this description will be realised when it is understood that there is no limit to the imprisonment that may be inflicted or the fine that may be imposed save the Court's unfettered discretion, and that the subject is protected by no right of general appeal.

Thus we find Lord Morris in delivering the judgment of the Privy Council in *McLeod* v. *St. Aubyn* [2], describing committal for contempt of Court as a weapon to be used sparingly and always with reference to the interests of justice. This is an authority that must command our respect. But it does not stand alone. In *Plating Co.* v. *Farquharson* [3], Jessel M. R., after saying that the practice of making their motions against innocent people ought to be discouraged as far as possible, added "they lead to great waste of time and to a considerable amount of costs and unless the Court is satisfied that the publication is a contempt which interferes with the course of justice, of course, the Court ought not to interfere;" while James L. J. said of the motion made against the proprietors of the newspaper who inserted an advertisement in the ordinary course of business, that it seemed to him to be idle and extravagant and a thing to be strongly discouraged. And later he says: "I think these motions are a contempt of Court in themselves because they tend to waste the public time."

In *Reg* v. *Gray* [4], Lord Chief Justice Russell spoke of this jurisdiction as one to be exercised only when the case is clear and beyond reasonable doubt.

[1] (1890) L. R. 15 P. D. 59, 64.
[2] (1899) A. C. 549.
[3] (1881) 17 Ch. D. 49.
[4] [1900] 2 Q. B. 36.

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Other opinions to the same effect might be multiplied, but these will suffice as an indication of the care and reserve with which these applications should be made. I will therefore limit myself to the citation of two cases which give an instructive illustration of the application of these principles. In *King* v. *Dolan*[1], proceedings were taken against Mr. Walter Long for a speech delivered by him commenting on a criminal case, and against others as connected with newspapers which published the speech.

This speech was an adverse comment on the failure of a jury to convict, made at a time when there was the prospect of a new trial.

It was said that language had been employed the use of which was much to be deprecated, and the speech was described by one of the learned Judges as capable of having the effect of prejudicing the trial, so that it appeared to him, that in that sense it constituted a contempt. But he goes on to ask, "is the contempt of so serious a character as, in the circumstances disclosed, to call for the exercise of the very special and summary jurisdiction vested in the Court?" His answer was in the negative, and in arriving at this conclusion the learned Judge explained that he was influenced by the leaning of the Courts in the more recent cases of alleged contempt to discourage applications where notwithstanding the *primâ facie* tendency of the language, there was no real prejudice created or no real case made for the interference of the Court. The judgment of the Lord Chief Justice is particularly instructive. He points out that for the purpose in hand there is no difference in principle between a prosecution and an action, and further that there is nothing more calculated to defeat the ostensible object of the motion than the motion itself.

Then after discussing the facts, he observes, "What does this all amount to? A possibility upon a possibility, a remote contingency upon a very remote contingency. We must look at the realities of things."

The learned Lord Chief Justice then cites the case of the *Evening Standard* which was described by Darling J. as one of extraordinary indiscretion and impropriety showing a very slight regard for the administration of Justice by the Courts of

[1] (1907) 2 Ir. Rep. 260.

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the King, yet upon the ground that he could not say it was really calculated to prevent a fair trial, he thought there should be no rule granted. Phillimore J. expressed his agreement and said he was very glad to have that opportunity of saying what he had to say, and what he had said before and what he said every time—that the world had gone mad on the doctrine of contempt of Court, and the doctrine ought not to be extended. These cases expound in the clearest terms the caution and reserve with which proceedings such as the present should be initiated, and no Court in the due discharge of its duty can afford to disregard them.

This motion against T. K. Biswas has wholly failed and in my opinion it must be dismissed. This respondent has been brought before the Court at considerable cost to himself, and the usual rule, when a motion for contempt is dismissed, is that the respondent's costs should be paid. In this case I think it would be but right that the respondent should receive his costs and that, to ascertain them, they should (if necessary) be taxed as between party and party as though in a hearing on the Original Side.

The order for costs will, as a matter of form, be against the Legal Remembrancer, the sole applicant on the record until the close of the case,—no costs were incurred after the amendment of the record by the addition of the Government.

But doubtless the Government will defray the costs that thus fall on their officer.

STEPHEN J.—This matter comes before us on a motion by the Advocate-General, as to the framing of which I have nothing to add to what has fallen from the Chief Justice.

The substantial questions that we have to decide are whether the publications complained of constitute a contempt of Court, whether we have power to commit the respondent for having printed and published them, and whether we ought to do so. Dividing the law from the fact, the questions become, *first*, what jurisdiction have we to deal with this matter, and, *secondly*, has the respondent been guilty of contempt ?

On the first point, the facts are of the simplest, and not in dispute. The respondent printed and published in Calcutta comments on events connected with a charge that had been

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made against a number of persons of an offence under section 121A of the Penal Code. The offence was said to have been committed in Barisal, and at the time of the publication complained of, warrants had been issued for the arrest of persons against whom complaints had been made, and it appears that some of them at least had been arrested. Under these circumstances, supposing the comments in question to be contumacious, what power have we to deal with them summarily? The power must in any case have its origin in the Common Law of England, and before we can exercise it, it is necessary to see whether it has been conferred on us. Since the decision in *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court*,[1] there is no doubt but that we have such a power in cases of contempts of this Court committed in Calcutta, derived from 13 George III c. 63, and the High Courts Act, 1861 (24 & 25 Victoria c. 104, s. 9). But here, though the contempt takes place in Calcutta, it is in the first place a contempt of another Court; and under what enactment or under what general principle of law can we take on ourselves to act in such a matter? It seems to me that there are four ways in which such a power can have been conferred on us. The power may have been possessed by one of the Courts abolished and superseded by us in 1864 and we may have derived it from such Court, as though by inheritance under clause 9 of our Charter. Secondly, the power may have been conferred on us or them directly by legislation. Thirdly, as we have a power of superintendence over the inferior criminal Courts, we may have corresponding power of protection. Fourthly, it may be that as appellate powers have been conferred on us as a Court, any act that tends to impede the course of justice in a Court from whose decision there is an appeal to us, and in particular any act that tends to prevent evidence being given there, or to taint such evidence, is a contempt of this Court.

To the supposition that we have inherited any power of commitment innate in any of the previously existing Courts, an objection which seems to me insuperable suggests itself at the outset. Under the High Courts Act, we inherit the powers vested in the Sudder Dewani Adawlut and the Sudder Nizamut Adawlut, which divided between them what are now our appellate

[1] (1883) I. L. R. 10 Calc. 109.

powers of criminal and civil jurisdiction respectively. Any power to deal with contempts in criminal cases in the mofussil that we may have inherited, we must therefore have inherited from the Sudder Nizamut Adawlut, and there is nothing to show that that Court was ever a Court of Record, a characteristic which is a qualification to the exercise of any power to commit. The Sudder Dewani Adawlut became a Court of Record by the East India Company Act of 1780 (2, George III, c. 70), but it was not till 1793 that the new Sudder Courts were connected by the Judges of one being the same as the Judges of the other, and the difference between the two lasted till the end. If it is argued that as a Court of Record we supply the one thing lacking to the Sudder Nizamat necessary to qualify it to commit, this takes the question out of the realm of inheritance and anticipates arguments that must be noticed hereafter.

If we have not inherited the power, has it been conferred on us by direct legislation ? For myself I can only say that our attention has not been drawn to any such legislation, and that examination of such Acts and Regulations as would be most likely to confer it, if it has been conferred, has not guided me to any. It is true that by their Original Patent of 1774, the Chief Justice and Puisne Judges, our predecessors in the Supreme Court, had such jurisdiction and authority throughout Bengal as Justices of the King's Bench had in England. But this seems not to confer any power on the Court, as distinguished from its members, and it is not suggested now that we have outside the scope of our original jurisdiction, any such general power of correcting what is wrong with the administration of justice, as from a very early date has been attributed to the King's Bench in England, and is recognised in *Rex* v. *Davies*[1] by describing it as *custos morum*. Indeed when power was given to Justices of the Peace and Zillah Courts to try British subjects in the mofussil, it was considered necessary to give a power of proceeding by *certiorari* limited to much narrower bounds than that possessed by the King's Bench.

In the early days of the Supreme Court, those whom we may regard as our predecessors in office encountered several difficult passages before the limits of their jurisdiction were finally recognised. I do not understand that the Advocate-General

1 [1906] 1 K. B. 32.

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wishes to revive the questions that were once so agitating by assuming a position which is based on merely historical grounds, and is perhaps more ours than his. But for myself I cannot help feeling that a truce of 150 years has some significance; and since, as far as appears, we have not in our Original Jurisdiction exercised any powers under the Common Law outside our local jurisdiction during, say the nineteenth century, I feel a reluctance to attempt to do so now. If we derive no rights for the present purpose from the Charter of 1774, still less do we derive them from any provision under the present Charter, sitting as we are in our Original Criminal Jurisdiction; for it is not suggested that that jurisdiction has been in any way extended.

The next point is that as we have a power of superintendence over the the inferior Courts, so we have also a power to protect them from improper interference. The argument is an attractive one because, as is said by Wills J. in *Rex* v. *Parke*[1] "it would seem almost a natural corollary" that a Court which controls an inferior Court should have power to protect it from "unlawful attacks and interferences with their independence": but the decision of the point is purposely avoided. In *Rex* v. *Davies*[2], however, the Court definitely took on itself the duty of protecting an inferior Court from improper interference in a case which it treated as being one that could not in the ordinary course come before it. But after a careful study of the case I am unable to read it as saying that control or superintendence necessarily implies a power to protect. The reasoning on which the decision depends is, as I apprehend it, that the King's Bench controls inferior Courts, being "in a special manner the guardian and protector of public justice throughout the kingdom"; it is almost suggested that it might protect Courts of equal authority, such as the Court of Chancery, and only does not do so because they can protect themselves. The power of punishing contempt is not so much to protect the Court or individual Judges from a repetition of offences against them, as to protect the public "specially those who are either voluntarily or by compulsion subject to (the Court's) jurisdiction from the mischief they will incur if the

[1] [1903] 2 K. B. 432, 442.

[2] [1906] 1 K. B. 32.

authority of the tribunal be condemned or impaired." To limit the power of committal to attacks on the committing Court would be to act on the wrong principle that the offended dignity of a Court is the subject of punishment. If an unimpeded course of justice is to be secured to inferior Courts, it must be done by the King's Bench and " if it be true that the King's Bench is in any sense the *custos morum* of the kingdom, it must be its function to apply with the necessary adaptations, to the altered circumstances of the present day, the same great principles that it has always upheld." The Court accordingly held that it could protect an inferior Court in the trial of a case that could never in ordinary course come before the King's Bench. The decision is admittedly a new departure in the sense that it applies an old principle to circumstances that are, for reasons given, such as have not risen before. But I cannot read the decision otherwise than as depending on general powers possessed by the King's Bench to secure a proper administration of justice to His Majesty's subjects, which I cannot find to have been conferred on us. It is therefore impossible to hold that our powers of superintendence imply any power of protection.

In the last place if the case that was being investigated at Barisal when the comments we have to consider were published should result in a trial and a judgment, that judgment may very well come before us on appeal in the ordinary course. That appeal will be tried in this Court on the evidence given in the Court at Barisal. As a matter of principle it seems to me undeniable that we have a right to treat as a contempt any act committed within the local limits of our original jurisdiction that may affect its trial on appeal, and in particular any act that may tend either to taint or impair that evidence or to cause evidence that would otherwise be forthcoming to be withheld. I do not mean to say that this indicates the limits of our jurisdiction; but in this case the acts complained of, namely printing and publishing, were committed in Calcutta and on the facts of the case I do not think that the contempt alleged need be considered from any point of view except the effect that it may have on the evidence to be given at Barisal. There is no authority on the subject, because till the establishment of the Court of Criminal Appeal

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in England in 1907 [after *Rex* v. *Davies* [1] had been decided] there was no appellate court in a position similar to ours, and it is therefore enough for me to state my opinion without amplifying it.

Turning now to the comments complained of, I will first consider what their effect really is, and then whether they constitute a contempt that we ought to punish summarily, bearing in mind that we have to consider the matter only from the point of view of an appellate court. The comments were published on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th of May, so that one may fairly be used to indicate the meaning of another; and with them must be considered an article of the 20th May put in by the respondent.

It is not necessary to consider the publications complained of in great detail, and it is not easy or perhaps possible to summarise them fairly. I will, therefore, only say that they seem to me certainly to contain allegations, or at least suggestions, that the police are collecting evidence unfairly and harshly, and may be expected to bring forward a false case which they have opportunities for doing. Arrests are being made with unusual harshness. If the case is tried before a Special Magistrate, the police will have it all their own way. The case should be tried before a so-called Special Tribunal. These allegations, repeated with details, which need not be considered, and with various florid terms of speech form the staple of the publications complained of.

The conclusion that I draw, from a careful and repeated examination of the publications placed before us, is that the writer in the first place wishes to attack the police and executive rather than judicial authorities, and to lay a foundation for saying that any convictions that may take place have been obtained by improper means. He is ignorant of the procedure which will be followed, he misnames the trying court, though I do not think he can be heard to say that when he speaks of a Special Magistrate he does not mean a Sessions Judge, and his impressions as to the effect of the Criminal Law Amendment Act 1900, and the Conspiracy Act, 1912, are erroneous. He writes recklessly, and in addressing readers more ignorant than

[1] (1906) 1 K. B. 32.

himself misrepresents the law. I consider that he is ready to use any possible argument for effecting his purposes.

For our immediate purposes, I need not consider and other aspect of this conduct than its effect on the hearing of a possible appeal. And I can come to no other conclusion than that this will probably be negligible. The case will not be tried before a Jury. The writer may, in the words of Lord Alverstone in *Rex* v. *Tibbits*[1] "produce...an atmosphere of prejudice in the midst of which the proceedings"—that is the trial—"must go on." He may thereby make the duty of the Sessions Judge more difficult than it would otherwise be, but he will not affect the Court of Appeal. Besides he is writing long before the trial, and the danger to be apprehended in *Rex* v. *Tibbits*[1] that they will have knowledge of facts that they ought not to have, is not present in this case. Most of the English cases relating to this kind of contempt have in view this particular danger, namely that a jury may be unduly influenced. This does not apply here. But there is in India a danger that does not exist to the same extent in England. Witnesses are more easily influenced here than they are there and writings such as we have before us may have the effect of deterring them from giving evidence which in the interests of justice should be given. For my part I should be willing to apply the law of contempt in India to the purpose of protecting witnesses, as it is applied in England to the protection of juries, a course which is fully justified by numerous authorities. But in the present case I cannot consider that there is sufficient probability of witnesses being improperly influenced to justify us committing the respondent.

There is good authority for saying that we are to consider the effects of the respondent's action rather than his intentions. But contempt is to be treated as a crime, though it may not be one in India as it is in England, and we do not need the abundant authority that there is on the point to say that, before we commit for a contempt of this character, it must be clearly made out that the course of justice may really be impeded. In the present case this, in my opinion, has not been done.

[1] (1902) 1. K. B. 77.

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On this view of the facts of the case, this motion must fail even though the law of contempt is stated in the widest terms applicable to the present case, and I do not think it is necessary to say more on the question of what constitutes a contempt, than that any act which tends to impede the course of justice is a contempt, if there is a well proved probability of such being its result. As this test is not fulfilled in the present case, I do not consider it necessary to enquire in further detail into this part of the question.

In conclusion I cannot refrain from saying that though I cannot hold that the conduct of the respondent amounts to a contempt, a very slight alteration in the facts of the case might produce an opposite result. The law on the subject in England is from some points of view ill-defined. In India owing to the course that legislation has followed, it is much more so. What is certain is, in the words of Wilmot C. J., that a Court of Justice without power to vindicate its authority, to enforce obedience to its mandates, or to shield those who are entrusted to its care, is an anomaly that ought not to be permitted to exist in any civilised community: and the Courts will no doubt be anxious to correct any such anomaly, if it exists as far as lies in their power.

I concur with the order suggested by the Chief Justice.

MOOKERJEE J. The Court is invited upon this application to order that Matilal Ghose, editor and manager, and Taritkanta Biswas, printer and publisher of the *Amrita Bazar Patrika*, a newspaper published in this city, do stand committed to prison for their contempt of Court in respect of the printing and publication, on the 19th, 20th, 21st, 22nd, 24th, 26th and 30th days of May, 1913, of articles which, it is alleged, tend or are calculated to interfere with the due course and administration of justice regarding the pending prosecution of King-Emperor *v.* Girindra Mohan Das and forty-three others in the Court of the District Magistrate of Barisal. In so far as the alleged editor and manager is concerned, the application has already been refused with costs, on the ground that the affidavits are wholly insufficient and there are no materials on the record upon which the Court can, on well recognised principles, be invited to take any action: *Queen* v. *Stanger*[1], *Gobinda Mohas Das* v.

[1] (1871) L. R. 6 Q. B. 352.

Kunja Behari Das[1]. No further reference will consequently be made in so far as the alleged editor and manager is concerned. In respect of the application against the printer and publisher, the case has been elaborately argued on both sides, and the following points emerge for the consideration of the Court, namely, *first*, is there a proper application upon which the Court can be invited to proceed against the printer and publisher; *secondly*, if it be assumed that the articles mentioned constitute a contempt of the Court of the Magistrate of Barisal, has this Court jurisdiction to punish the printer and publisher for such contempt; and, *thirdly*, if this Court has no jurisdistion to punish for contempt of a subordinate Court, do these articles constitute a contempt of this Court, so as to render the printer and publisher liable to be punished for such contempt?

In so far as the first of these questions is concerned, it is necessary to state that when the application was made on the 6th June last, it was observed by the Court that it purported, on the face of it, to be made by the Superintendent of Legal Affairs and *ex-officio* Public Prosecutor. The Court declined to entertain the application, till it was stated by Advocate-General that he moved on behalf of His Excellency the Governor of Bengal in Council. Special leave was thereupon granted to the Advocate-General to serve notice of motion upon the two persons against whom the application was made. Notice was subsequently served, as well upon the alleged editor and manager as upon the printer and publisher. The application, however, it transpired at the hearing, was not amended, and even after special leave had been granted to the Advocate-General to move on behalf of His Excellency the Governor of Bengal in Council, the application stood as if it was made by the Superintendent and Remembrancer of Legal Affairs and the notice of motion ran in the same terms. Under these circumstances, the printer and publisher has urged that there is no proper application before the Court. This contention is manifestly well founded. It has been argued that the office of Legal Remembrancer, mentioned in Regulation IX of 1793 and formally created by Regulation VIII of 1816 was abolished

[1] (1909) 10 C. L. J. 414.

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by Regulation XIII of 1829, and the repeal of the Regulation last mentioned by Act VIII of 1868 did not operate to revive the office as a statutory office. To this argument, no serious answer has been attempted on behalf of the Crown, but it has been stated that by Resolution of Government in 1845, the office was revived and has since then been continued. It has also been stated that the Legal Remembrancer is, by executive order, Judicial Secretary to the Government and ex-officio Public Prosecutor for the Presidency of Bengal. This is obviously immaterial for our present purposes. Leave was explicitly granted to the Advocate-General to move on behalf of His Excellency the Governor in Council, on the faith of the assurance that the application had been authorised by the Governor in Council. The application ought to have been drawn up accordingly, and notice of motion served in strict conformity therewith. It is indisputable that this has not been done. The Legal Remembrancer is not shown to be competent to appear and act on behalf of the Crown on the Crown Side of this Court; yet, as transpired at the hearing, no power of attorney had been filed till three days after leave to serve notice had been obtained from this Court. It would be a mistake to suppose that this is a mere matter of form; it is plainly a matter of vital importance for the party against whom the order is sought, to know the person or persons at whose instance the application is made; if the application is refused, he is entitled to know who is responsible for his costs; if, on the other hand, the application is successful, he is entitled to know who is respondent in a possible appeal by him. In view of these circumstances, and also in view of the fact that the proceeding is in the nature of a criminal proceeding, the Court is bound to insist that the application on behalf of the Crown should be made with some approach to regularity and accuracy. The Advocate-General has consequently been constrained, at the close of the arguments which lasted for four days, to apply for leave to amend the petition on behalf of the Crown. In the circumstances of this case, the Court decided to grant leave to amend. This is in conformity with the decision of Chitty J. in *Callow* v. *Young* [1]. In that case, the learned Judge stated that he would be very slow to give leave

[1] (1887) 56 L. J. N. S. Ch. 690.

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to amend the notice of motion, if it were in any way likely that by so doing an injustice would be done to any party ; he therefore gave leave to amend the notice of motion, but directed the motion to stand over so that notice might be served again : see also *Buist* v. *Bridge* [1]. Since leave to amend was granted, a certificate has been produced from the Chief Secretary to the Government of Bengal to the effect that the application had been authorised by His Excellency the Governor of Bengal in Council and the petition will be amended accordingly by the addition of the Governor in Council as petitioner. The application may consequently be now deemed to be in order.

In so far as the second question is concerned, it has been contended on behalf of the printer and publisher that even if it be assumed for a moment, for the purposes of argument—and for that purpose only—that the articles mentioned constitute a contempt of the Court of the Magistrate of Barisal, yet the High Court has no jurisdiction to punish him for the alleged contempt. This has been controverted on behalf of the Crown, and reliance has been placed upon the decisions in *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court* [2], *Rex* v. *Davies* [3] and in *In re Venkat Rao* [4]. The question raised is one of great importance and its determination is by no means free from difficulty, the gravity of which has not even been realised by the Advocate-General who appeared on behalf of the Crown. For the solution of the problem, we must turn in the first place to the Indian High Courts Act (24 and 25 Vict. c. 104) and the Letters Patent dated the 14th May, 1862, by which this Court was constituted. Section 9 of the Indian High Courts Act, which defines the jurisdiction and powers of the Indian High Courts, provides as follows :

" Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admirality, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by

[1] (1880) 43 L. T. 432.
[2] (1883) I. L. R. 10 Calc. 109.
[3] (1906) 1 K. B. 32.
[4] (1911) 21 Mad. L. J. 832.

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such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitation as to the exercise of original, civil, and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned courts."

The Courts which were abolished upon the establishment of this High Court are specified in section 8, namely, the Supreme Court and the Courts named Sudder Dewani Adawlut and Sudder Nizamut Adawlut at Calcutta. Consequently, the fundamental question which requires examination is,—whether, in a matter of the description now before us, any of the abolished Courts had jurisdiction, power or authority to make the order which this Court is now invited by the Crown to pass. Now, in so far as the Supreme Court of Calcutta is concerned, it is manifest from an examination of Stat. 13 Geo. III c. 63 and the Charter of the 26th March, 1774, by which the Supreme Court was established, that the Supreme Court, if it existed now, would have had no jurisdiction to punish the printer and publisher before us for contempt of a court situated beyond the territorial limits of Calcutta. A Criminal Court at Barisal would in no way be subject to the authority of the Supreme Court as is plain from clause 21 of the Charter of 1774, and even if it were assumed that the Supreme Court, constituted a Court of Record by clause 2 of the Charter and invested with the powers of the Court of King's Bench by clause 4, had inherent authority to punish a contempt of a subordinate Court, it would not follow that the Supreme Court could punish for contempt of a court not subordinate to its authority. In so far as the Court of Sudder Dewani Adawlut of Calcutta is concerned, it was no doubt a Court of Record, and its establishment had been authorised by a statute of Parliament (21 Geo. III c. 70 sec. 71). But the Sudder Dewani Adawlut, as its name implies had no jurisdiction in criminal matters, and

if the case now before us had happened in 1862, before the abolition of the Sudder Dewani Adawlut, it could not have been suggested with any approach to plausibility that the Sudder Court could have punished a contempt of a Criminal Court at Barisal. Consequently, the only other abolished Court whose jurisdiction, power or authority we have to consider is the Sudder Nizamut Adawlut. The history of the establishment and development of the Sudder Nizamut Adawlut has been investigated by authoritative writers, amongst whom may be mentioned Harington (Analysis of Bengal Regulations), Auber (Rise and Progress of the British Power in India). Beaufort (Digest of Criminal Law), Cowell (History and Constitution of Indian Courts) and Field (Introduction to the Bengal Regulations). The details of this history need not be set out here for our present purposes, but it will be found outlined in the first section of Regulation IX of 1793. From an examination of this history, two points appear to be indisputable, namely, *first*, that the Sudder Nizamut Adawlut was not a King's Court, but the Company's Court, and, *secondly* that the Sudder Nizamut Adawlut was not a Court of Record, though it had power of superintendence over subordinate Criminal Courts (Regulation IX of 1807, Sec. 24.) Consequently, even if it be assumed for a moment that a Court of Record has power to punish for contempt of a subordinate Court, it is plain the Sudder Nizamut Adawlut would have had no authority, if the case before us had happened while that Court was still in existence, to punish for contempt of a subordinate Court at Barisal. I have searched in vain for a single instance of the exercise of power by the Sudder Nizamut Adawlut to punish for contempt of a Subordinate Criminal Court; the published reports and the constructions issued from time to time, do not furnish any indication that such a power was ever claimed or exercised. On the other hand, statutory provisions completely negative any possible theory that the Sudder Nizamut Adawlut had inherent jurisdiction to punish for contempts of subordinate Criminal Courts. Reference may in this connection be made to section 22 of Regulation III of 1803 which made a provision for punishment of contempt of Court in open Court. An examination of Regulation XII of 1825, which was passed avowedly for the uniform punishment of contempts of Court in

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any of the Courts of Judicature, Civil or Criminal, and which repealed section 59 of Regulation IX of 1793 and section 28 of Regulation VII of 1803, is also instructive in this connection. This Regulation was repealed by Act XVII of 1862. Meanwhile, Act XXX of 1841 had been placed on the statute book, and thereby it provided that any person using menacing gestures or expression or otherwise obstructing justice in the presence of an officer trying criminal cases or in any superior or inferior Civil or Criminal Court was liable to pay a fine of two hundred rupees, or, in default of payment to suffer imprisonment for one month. It was further laid down that where no proceedings had been held under this clause in the Court where the offence was committed, any party amenable to the Supreme Court might be indicted as for a misdemeanour. It is significant that on the 3rd February, 1843, the Sudder Nizamut Adawlut issued a Construction (128) by which it was ruled that Act XXX of 1841 was the only law under which contempt of Court could then be punished, as already laid down in Construction 225 of the 17th October, 1842, and that, consequently, prevarication could not be any longer punished as contempt of Court, as it was not correctly classable as an obstruction to justice under Act XXX of 1841. It is also worthy of note that the Sudder Nizamut Adawlut had previously ruled in Construction 619 of the 21st January, 1831, that under the Regulations as they stood at the time, the only contempt which the Court had authority to punish was contempt committed in open Court. From an examination of the legislative provisions on the subject and of the Constructions issued thereon by the Sudder Nizamut Adawlut, from time to time, it is to my mind plain beyond serious controversy that the Sudder Nizamut Adawlut, when it was abolished, had no jurisdiction to punish for a contempt of a subordinate Criminal Court. On the other hand, there are ample indications that its authority to punish for contempt of itself was of a somewhat restricted character. Consequently, it follows from this review of the status and constitution of the Supreme Court, the Sudder Dewani Adawlut and the Sudder Nizamut Adawlut to punish for contempt of Court, that none of these Courts would have been competent to punish contempt of an inferior Criminal Court at Barisal in the circumstances of the case before us. The conclusion is inevitable that the

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jurisdiction, power, and authority, which this Court has inherited from the three abolished Courts is of no avail to the Crown.

The next question which requires examination is, whether this Court, apart from its inherited jurisdiction, power and authority, is competent under the Indian High Courts Act and its Letters Patent, to punish for contempt of a subordinate Criminal Court. Clause 1 of the Letters Patent constitutes the High Court to be a Court of Record, and this was continued by the Letters Patent of 1865. It is plain therefore that in one aspect the High Court is in a position different from that occupied by one of the abolished courts, namely, the Sudder Nizamut Adawlut which was, as we have seen, not a Court of Record nor a King's Court. It has been argued in support of the application that the High Court as a Court of Record has inherent authority to punish for a contempt of a subordinate Court which is subject to its superintendence under section 15 of the Indian High Courts Act, and over which it exercises appellate and revisional jurisdiction under clauses 27 and 28 of the Letters Patent of 1865, which replace clauses 26 and 27 of the Letters Patent of 1862. Now, it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock, C.J., observed in *In re Abdool and Mahtab*[1] that this Court, by the express terms of the Letters Patent, is a Court of Record, and there can be no doubt that every Court of Record has the power of summarily punishing for contempt. To the same effect, is the observation of Lord Chelmsford in *McDermott* v. *Judges of British Guiana*[2]. See also *Kochappa* v. *Sachi Devi*[3]. This proposition when applied to cases of contempt of a court of Record itself, is defended on the ground that the right of every superior Court of Record to punish for contempt of its authority or process must be deemed inherent from the very nature of its organisation and essential to its existence and protection and to the due administration of justice. But, obviously, a very different question arises when it is claimed that a Court of Record has authority to punish for contempt of a subordinate Court which is subject to its superintendence and over which it exercises appellate or revisional jurisdiction. When such a claim is put forward, it becomes necessary to examine

[1] (1867) 8 W. R. Cr. 32. [2] (1868) L. R. 2 P. C. 341.
[3] (1902) I. L. R. 26 Mad. 494.

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whether the principle on which the rule is founded, in so far as contempt of its own authority is concerned, is equally applicable to the case whether it is alleged that there has been a contempt of a Court subordinate thereto. Now, what is a Court of Record? Blackstone, in his Commentaries (Book 3, Chap. III, p. 24) states that a Court of Record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the Records of the Court and are of such high and super-eminent authority that their truth is not to be called in question. All Courts of Record are the King's Courts, in right of his Crown and Royal dignity and, therefore, no other Court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a Court of Record. With regard to this statement, it may be observed that every Court of Record has not necessarily a power to fine or imprison, and there may be King's Courts which are not of Record. Stephen in his Commentaries (15th edition, 1908, Vol. 3, page 314) reproduces the statement of Blackstone, but with an important variation, namely, he says that "all Courts of Record are the Courts of the King, in right of his Crown and Royal dignity; and, therefore, no other Court hath authority to fine and imprison for *contempt of its authority*," and refer in support of this proposition to Hawkins on Pleas of the Crown, Book 2, Chap. 22, Sec. 1 Bacon's Abridgment Tit. Courts: *R.* v. *Clement*[1], *R.* v. *Davison*[2], *R.* v. *James*[3], *Miller* v. *Knox*[4], and *Doe d. Cardigan* v. *Bywater*[5]. It is further pointed out that in some Courts of Record, for example in Country Courts, this power to punish for contempt is limited to contempts committed in the face of the Court, as indicated by *Levy* v. *Moylan*[6] and *Queen* v. *Lefroy*[7]. It is fairly clear therefore that the definition of a Court of Record as given by Blackstone and Stephen does not indicate that a Court of Record, whether so by Parliamentary Statute, by Letters Patent or by prescription, possesses as such, any inherent authority to punish a contempt of a subordinate

[1] (1821) 4 Barn. & Ald. 218; 23 R. R. 260; 25 R. R. 710.
[2] (1821) 4 Barn. & Ald. 329; 23 R. R. 295.
[3] (1822) 5 Barn. & Ald. 894; 24 R. R. 611.
[4] (1838) 4 Bing. N. C. 574.
[5] (1849) 7 C. B. 794.
[6] (1850) 10 C. B. 189; 84 R. R. 524.
[7] (1873) L. R. 8 Q. B. 134.

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Court. Is there, then, anything in the reasons assigned in support of the principle that a Court of Record can punish a contempt of its own authority which makes them applicable to a contempt of authority of a subordinate Court? Blackstone in his Commenteries (Vol. IV, page 286) declares that "laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the Supreme Courts of Justice to suppress such contempt by an immediate attachment of the offender results from the first principle of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." To the same effect is the exposition given by Mr. Justice Field in *Exparte Robinson*[1]. "The power to punish for contempt is inherent in all Courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of Courts, and consequently to the due administration of justice," Gray, C. J., observed in similar terms in *Cartwright's Case*[2] that "the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior Courts, as essential to the execution and to the maintenance of their authority and is part of the law of the land." Harris, J., stated in *Watson* v. *Williams* [3] that the power to fine and imprison for contempt, from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a Court, without which it could no more exist than without a Judge; it is a power inherent in all Courts of Record and co-existing with them by the wise provision of the Common Law." Snyder J. observed in *State* v. *Frew* [4], that it was "a proposition of law unquestioned and unquestionable that by the Common Law of England, as well as by the uniform decision of the Court of the United States, Courts have the inherent power to punish contempt in a summary manner, and that this power is an essential element and part of the Court itself, which cannot be taken away

(1) (1873) 19 Wallace 505.
(2) (1873) 114 Mass. 238.
(3) (1850) 86 Mis. 341.
(4) (1884) 24 W. Va. 416; 49 Am. Rep. 257.

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without impairing the usefulness of the Courts, because it is a power necessary to the exercise of all others." Marshall J. observed in *State* v. *Shepherd*[1] that if the Court did not possess the power to punish contempts committed against itself, the jury and its officers, summarily, it would be easy for a contemner to escape punishment entirely, for if the matter was sent to another Court or left to be tried by a Jury, the contemner could so insult and abuse such other Court or the Jury as to render it impossible for them also to try him also, and by thus renewing his offence to every Court he was called before, make it impossible to punish him at all. It is plain that the reasons thus assigned do not indicate that a Court a Record has inherent power to punish for contempt of inferior Court over which it exercises a power of superintendence and which is subject to its appellate and revisional jurisdiction. On the other hand it is a fundamental rule that ordinarily one Court cannot punish a contempt against another Court or Judge, and this principle is based on the doctrine that the offence is substantially criminal and the power to punish it is vested alone in the Court whose judicial authority is challenged : *Ex-parte Bradley*,[2] *Ex-parte Tilling Hast*[3], *Callan* v. *McDaniel*[4], *Tindall* v. *Westcott*[5], *Atchinson Railway Co.* v. *Gennison*[6], *In re Williamson*(7), *Voorhees* v. *Albright*[8]. The position however, is obviously different where the contempt is against subordinate officers of the Court ; such a contempt is rightly regarded as contempt of the authority of the Court by which the officer was appointed, and may be punished on well-recognised principles. There is consequently no foundation laid by the Crown for the theory that this Court as a Court of Record has authority to punish for contempt of the Court of the Magistrate of Barisal merely because this Court is a Court of Record which exercises power of superintendence over that Court or because that Court is subject to its appellate and revisional jurisdiction. The hypothesis that a superior Court which exercises a power of superintendence over a subordinate Court

[1] (1903) 177 Mo. 205 ; 99 Am. St. Rep. 624 ; 76 S. W. 79.
[2] (1868) 7 Wallace 364.
[3] (1830) 4 Petter 108.
[4] (1882) 72 Alabama 96.
[5] (1900) 113 Geo. 114 ; 15 L. R. A. 225.
[6] (1886) 60 Mich. 232 ; 27 N. W. 6.
[7] (1855) 26 Pa. St 9 ; 67 Am. Dec. 374.
[8] (1879) 28 Fd. Cas. 16999.

possesses by implication a power to afford to such Court protection against contempts of its authority is no doubt attractive, but has no solid foundation in the history of the constitution of our Courts. The Advocate-General has, however, strongly relied upon three cases. The first of these, *Surendra Nath Banerjee* v. *Chief Justice of Bengal*[1], is of no assistance. In that case, the contempt was of the authority of this Court in the exercise of its original civil jurisdiction ; there is no room for controversy that this Court had ample authority to punish contempt of that description. The second case upon which reliance is placed is the decision in *In re Venkat Rao*[2]. With all respect for the learned Judges who decided that case, I am unable to agree in their view that the High Court possesses the inherent common law powers in connection with matters of contempt which were exercised formerly by the Court of King's Bench and now by the King's Bench Division. In support of this comprehensive proposition, they rely upon the decision of the Judicial Committee in *Surendra Nath Banerjee* v. *Chief Justice of Bengal*[1]. But, as already explained, in the latter case, the contempt had been committed in relation to the High Court in the exercise of its original civil jurisdiction. Now, it cannot be questioned that the High Court in so far as it has inherited the jurisdiction, power and authority of the abolished Supreme Court can exercise all the powers which might have been exercised by the Supreme Court, and consequently the powers exerciseable by the Court of King's Bench, although, even upon this matter, there may be room for controversy, whether in so far as contempts of proceedings are concerned, the more recent development of the law in England is applicable in this country, in view of the provisions of clause 21 of the Charter of 1774 which may indicate that the growth of the law on this subject has been arrested. That is a question of some nicety, however, upon which I reserve my opinion ; but it it is plain that the proposition that the High Court in so far as it has inherited the jurisdiction of the abolished Supreme Court possesses inherent common law powers in connection with matters of contempt which were exercised by the

[1] (1883) I. R. 10 Calc. 109. [2] (1911) 21 Mad. L. J. 832.

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Court of King's Bench, is of no assistance in the solution of the problem now before us namely whether the High Court as a Court of Record can punish for contempt of a subordinate Court over which it exercises powers of superintendence and which is subject to its appellate and revisional jurisdiction. The fundamental distinction between the two questions is easily realised from an examinations of the decision in *Rex* v. *Davies*[1], upon which the Advocate General relies as the learned Judges of the Madras High Court did in *In re Venkat Rao*[2]. The decision in *Rex* v. *Davies* [1] is based on the ground that the King's Bench Division has power to punish by attachment contempts of inferior Courts. This conclusion is not based on the ground that the King's Bench Division possesses this power merely because it is a Court of Record, or, because it exercises powers of superintendence over inferior Courts. The decision is based, as is clear from the judgment, as also from the judgment in the earlier case of *Rex* v. *Parke*[3], that the decision is founded on a historical consideration of the supreme place in the judicature assigned to the Court of King's Bench, which according to Lord Coke had power to "correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects or any other manner of misgovernment," and according to Howkins had power to "deal with every kind of misdemeanour including those which are properly the subject of indictment or criminal information as well as those which are punishable summarily by attachment." To use the language of Mr. Justice Wills, the authorities quoted by him serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior Courts and that it is in a special manner the guardian and protector of public justice throughout the kingdom. It is ovious that these considerations of a very special character have no application to this Court, and if we were to apply the principle which lies at the foundation of the decision in *Rex* v. *Davies*[1] we would have to hold that the Common Law of England is applicable throughout the jurisdiction of this Court, even to persons other than British subjects beyond what was the territorial limit of the ordinary jurisdiction of the ablished Supreme Court. Such a

[1] [1906] 1 K. B. 32.

[2] (1911) 21 Mad. L. J. 832.

[3] [1903] 2 K. B. 432.

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view would be clearly erroneous and in direct contravention of the express provision of the Letters Patent where by this Court was constituted. It is further worthy of note that even in England the decision in *Rex* v. *Davies*[1] has met with adverse comment, as it was unquestionably an extension of what had been up to that time generally regarded as the limits of the law on the subject: *R.* v. *Berchett*[2], *In the Matter Of An Application For An Attachment For Contempt Of Court*[3]. A similar view has been taken in the Courts of the United States. There it has been held that a superior Court cannot punish for contempt of an inferior Court: *Penn* v. *Messinger*[4]; *In re Emery*[5]. Similarly it has been held that although every superior Court possesses an inherent power of employing contempt proceedings to prevent interference with its administration of justice, [*Ex parte Fernandez*[6], *Ex parte Terry*[7]], this power can be exercised only by the superior Court whose authority is being defied: *Androscoggin* v. *Androscoggin*[8], *People* v. *Placer Country Judge*[9]. I am not unmindful that in Victoria it was recently held in *In re Packer*[10] that where a newspaper has published statements tending to prove that a person accused of murder and remanded to appear before a lower Court was guilty, the Supreme Court had jurisdiction to punish the members of the staff of the paper for contempt. This decision, however, like the decisions in *Rex* v. *Davies*[1] and *Rex* v. *Clarke*[11] has met with weighty adverse comment (25 Harvard L. R. 561) where it is pointed out that although the summary contempt process is allowed on the theory that otherwise the Court would be prevented from the exercise of its proper function, [*United States* v. *Hudson*[12], *Cartwright's Case*[13]], the recent authorities by which the law has been extended proceed on the ground that where a subordinate Court is powerless to prevent an interference with its administration of justice, the superior Court should intervene by an attachment for contempt. It is also very significant that when the case

[1] (1906) 1 K. B. 32.
[2] (1722) 1 Strange 567; 93 E. R. 704.
[3] (1886) 2 T. L. R. 351.
[4] (1791) 1 Yeates (Pa.) 2.
[5] (1907) 149 Mich. 383; 112 N. W. 951.
[6] (1861) 10 C. B. N. S. 3.
[7] (1888) 128 U. S. 289.
[8] (1862) 49 Maine 392.
[9] (1865) 27 California 151.
[10] (1911) V. L. R. 401
[11] (1910) 103 L.T. 636.
[12] (1812) 7 Cranch, 32, 34.
[13] (1873) 114 Mass. 230, 238.

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of *In re Packer*[1] was taken by way of appeal by special leave to the High Court of the Commonwealth of Australia [*Packer* v. *Peacock*[2]], the order of the Supreme Court was supported on the ground that the publication in question constituted a contempt of the Supreme Court itself, although the publication was made while the matter was still before the Justices. It was ruled that where a person has been arrested and charged on information with an offence in respect of which Justices may commit him for trial in the Supreme Court, the publication after his arrest and before he has been so committed, of matter tending to prejudice his fair trial in the Supreme Court is a contempt of the Supreme Court which that court has jurisdiction to punish. It is worthy of note that even this conclusion was reached with considerable hesitation and reluctance, though the Supreme Court of Victoria has and always has had the same jurisdiction as the Court of King's Bench had in England at Common Law. It must further be observed that the charge was of murder, which in Victoria is only triable before the Supreme Court, so that the procedure prescribed by law for bringing the accused to trial might be deemed, in principle, a continuous process beginning with the arrest and ending with the conviction or acquittal, so that the intermediate proceedings were in substance stages in this single process.

It may further be urged against the extension of the doctrine that a proceeding in contempt of the description now before this Court is really in the nature of a criminal proceeding [*In re Pollard*[3]], and the court must hesitate to create a new crime. The distinction between criminal and civil contempt is of a fundamental character, though it has been sometimes overlooked. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is failure to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed against the

[1] (1911) V. L .R. 401.
[2] (1912) 13 Com. L.R. 377.
[3] (1868) L.R. 2 P.C. 106; 5 Moo. P. C. N. S. 110; 16 E.R. 457.

majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases. It is conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in those cases where the two gradually merge into each other. But, in ordinary cases, the line of demarcation is not difficult to determine: *Scott* v. *Scott* [1]. Reference may in this connection be made to the judgment of Lord Hardwicke in the case of *In re St. James Evening Post* [2] where the Lord Chancellor observed as follows: "There are three different sorts of contempt. One kind of contempt is, scandalising the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persors before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety, both to themselves and their characters." It is worthy of note that the first kindo f contempt mentioned by Lord Hardwicke is a matter wherein the State is vitally interested; it is obviously a criminal contempt. The other two kinds of contempt spoken of are such as directly affect a party litigant, and at the same time affect the State in so far as it is of importance "to keep the streams of justice clear and pure." See also *Charlton's Case* [3], *Macgill's Case* [4], *In re Wallace* [5], *People* v. *Oyer and Terminer Court* [6], *State* v. *Knight* [7]. The distinction between a civil and criminal contempt is explained by Mathew J. *In re Davies* [8] and is also clear from *Onslow's Case* [9] and *Skipworth's Case* [10]. In my opinion, it is plain beyond controversy that if the contempt alleged in this case be established, it is a criminal contempt: *Reg.* v. *Gray* [11], *American Exchange* v. *Gillig* [12], *Rex* v. *Davies* [13], *McLeod* v. *St. Aubyn* [14]. Consequently what the Court is invited by the Advocate-General

[1] [1913] A. C. 417.
[2] (1742) 2 Atk. 469; 26 E. R. 633.
[3] (1837) 2 My. & Cr. 316; 40 E. R. 661.
[4] (1748) 2 Fowl. 404.
[5] (1866) L. R. 1 P. C. 283.
[6] (1886) 101 N. Y. 245; 54 Am. Rep. 691.
[7] (1893) 3 S. D. 509; 44 Am. St. Rep. 809.
[8] (1888) 21 Q. B. D. 236.
[9] (1873) L. R. 9 Q. B. 219.
[10] (1873) L. R. 9 Q. B. 230.
[11] [1900] 2 Q. B. 36.
[12] (1889) 58 L. J. Ch. 706.
[13] [1906] 1 K. B. 32.
[14] [1899] A. C. 549.

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to do is to create a new crime, because, as has been conclusively established, at the time when this Court was constituted none of the three abolished Courts had, notwithstanding the Preamble to the Indian Penal Code, jurisdiction to punish for the criminal contempt alleged in the case before us. If a contempt of this character is to be treated as a crime, and it is to be made summarily punishable [*Queen* v. *Lefroy*[1], *Queen* v. *Judge of the Brompton County Court and Vague*[2]], the question is obviously a matter for the consideration of the Legislature and beyond the decision of the Court. On these grounds, I feel convinded that this Court, though it is a Court of Record and though it exercises powers of superintendence over the Court of the Magistrate at Barisal and though that Court is subject to the appellate and revisional jurisdiction of this Court, has no power to punish for contempt of the Court of the Magistrate at Barisal.

As the second question has been answered in the negative, the third question now requires consideration, namely, do these articles constitute a contempt of this Court, so as to render the printer and publisher liable to punishment for such contempt? This aspect of the matter was not developed, possibly not even appreciated, on behalf of the Crown, but it merits examination, as it is the only possible ground upon which the present application may be supported with any semblance of plausibility. Before I proceed to consider the articles, it is necessary however to premise that conduct which amounts to contempt of a subordinate Court does not necessarily amount to contempt of a superior Court. It is not essential for the present purpose to specify exhaustively the various acts which may constitute contempt. Blackstone in a celebrated passage of his commentaries (Vol. IV., page 285) specifies some of them: "Some of these contempts may arise in the face of the Court as by rude and contumilious behaviour, by obstinacy, perverseness or prevarication, by breach of the peace or any wilful disturbance whatever others in the absence of the party, as by disobeying or treating with disrespect the King's writ or the rules or process of the Court; by perverting such writ or process to the purposes of private malice, extortion or injustice; by speaking or writing

[1] (1873) L. R. 8 Q. B. 134.

[2] [1893] 2 Q. B. 195, 200.

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contemptuously of the Court or Judges, acting in their judicial capacity, by printing false accounts or even true ones, without proper permission, of causes then depending in judgment; and by anything in short that demonstrates a gross want of that regard and respect which, when once Courts of Justice are deprived of their authority so necessary for the good order of the Kingdom, is entirely lost amongst tha people". It may be added that there might be a contempt of Court by tampering with evidence and witnesses or suppressing testimony, or, as is put in *Skipwarth's case*[1] if witnesses are attacked, frightened, or deterred. Contempt may also be committed by publications concerning a pending cause, trial or judicial investigation, calculated to prejudice or prevent fair and impartial action, which seek to influence judicial action by treats or other form of intimidation, which reflect upon the Court, counsel, parties, or witnesses respecting the cause, which are calculated to threaten or intimidate witnesses or which tend in any manner to corrupt or embarrass in any manner the due administration of justice: *Daw* v. *Eley*[2], *In re Crown Bank*[3], *Skipworth's Case*[4], *R.* v. *Clement*[5], *Littler* v. *Thomson*[6], *Reg.* v. *O' Dogherty*[7], *Tichborne* v. *Tichborne*[8], *Kitcat* v. *Sharp*[9], *Hunt* v. *Clarke*[10]. In the case before us, the only imaginable ground on which it can be argued that the articles in question constitute a contempt of this Court is that witnesses might be kept back, with the possible result that there might not be a fair trial, and that if the matter should be hereafter brought up to this Court, this Court might be hampered in the due administration of justice. Let it be assumed for the purpose of argument and for that purpose alone that there may be a contempt of this Court under circumstances like these, that is, by publication of an improper character made long before the proceedings have been brought to this Court. The question arises, do the articles to which exception is taken, fall within this category. The determination, as has been repeatedly pointed out, is not a matter

[1] (1873) L. R. 9 Q. B. 230, 232.
[2] (1868) L, R. 7 Eq. 49.
[3] (1890) 44 Ch. D. 649.
[4] (1873) L. R. 9 Q. B. 230, 232.
[5] (1821) 4 Barn. & Ald. 218; 23 R. R. 260; 25 R. R. 710.
[6] (1839) 2 Beav. 129; 48 E. R. 1129.
[7] (1848) 5 Cox. C. C. 348.
[8] (1870) 39 L. J. Ch. 398.
[9] (1882) 52 L. J. Ch. 134.
[10] (1889) 58 L. J. Q. B. 490.

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Advocate-General minutely criticised the language used in these articles; in fact the analysis was so close and the criticism so severe that they considerably diminished the weight which the Court would otherwise be inclined to attach to an argument on behalf of the Crown in a proceeding of a criminal nature. The obvious course to pursue in cases of this description is to read the articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. Tested from this point of view, how do these articles stand? In the first place, they comment upon the method of house searches and the annoyance and hardships they cause in many instances to innocent persons. In the second place, they comment upon the mode of arrest of suspected persons, sometimes in what may not inappropriately be called an almost dramatic manner. In the third place, these articles comment upon the employment of Gurkha soldiers, which it is asserted is wholly unnecessary for purposes of judicial investigation of the alleged crime. In the fourth place, the articles comment upon the mode of treatment of the persons arrested, and it is suggested that those against whom there is no direct evidence should not be treated with needless severity and harshness. If we do not allow ourselves to be embarrassed by ingenious comments, we can hold without difficulty that positive evidence here means direct evidence as opposed to circumstantial evidence, in other words, the evidence of an eye witness. In substance, the articles assert that persons who have not been proved to be guilty or persons against whom there is no direct evidence should be deemed innocent and treated as such. In the fifth place, these articles express the opinion that the accused ought not to be tried by a Special Magistrate but by this Court. This comment is futile, because the accused cannot under the law be tried by a Special Magistrate; the investigation may be made by a Magistrate, but the trial must take place before the Court of Session. On the other hand, the case cannot be tried by this Court, unless the statutory conditions formulated in the Indian Criminal Law Amendment Act, 1908, have been fulfilled, namely, that there has been a determination by the Government that the conditions under which such mode of trial is permissible, exist in the present instance, that is, such trial is needed in the interests of peace and good order. This

of form, but of substance, a matter of judgment founded upon the materials on which the presecution is intended to be based. In the sixth place, these articles express the desire that such amongst the acaused as are guilty should be punished, but such as are innocent should be acquitted on a fair trial. In the seventh place, these articles implore His Excellency the Governor to examine the matter for himself and to determine whether the material before him justifies the initiation and continuance of the proceedings. In the eighth place, these articles do undoubtedly insinuate in places that the preliminary investigation by the police has been carried on in an objectionable manner. An insinuation of this description may merit strong disapprobation, and it is unfair to the investigation officers, inasmuch as the vagueness and generality of the charge makes it impossible for any individual member to repudiate the charge or to defend his character. But I am unable to accept the contention that an allegation of this character constitutes a contempt of Court. I must emphatically repudiate the astonishing proposition that the Criminal Investigation Department is the prosecutor in the criminal case before the Court of the Magistrate at Barisal, and that consequently imputations, veiled or otherwise, to the effect that the investigation by the department has been carried on in an objectionable manner constitute a contempt of Court. I must assume that the prosecution has been instituted by and with the sanction of the Governor in Council, and that whatever share the Criminal Investigation Department may have in the investigation of the case, they cannot be deemed in law, and I trust they are also not in fact, the prosecutors in the criminal case. The statement that the Criminal Investigation Department is really the prosecutor in the criminal case, taken along with the circumstance that the articles make, insinuations as to the mode of investigation by that Department may, no doubt, explain the origin of the application made to this Court to commit the printer and pubsher for contempt. But it plainly does not establish that the articles do constitute a contempt of the Court of the Magistrate of Barisal, much less of this Court. The Advocate-General has strenuously contended that the articles in question are of an extremely reprehensible character and that in fact it is difficult to imagine any comment on a pending cause more worth of the

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strongest condemnation. It must be remembered, however, that we cannot consider these articles except for the determination of one question and one question alone, namely, whether they constitute contempt of this Court; we cannot fairly be invited to express an opinion upon a matter not before the Court a matter, in fact, which has not been even argued; but I desire to observe that these articles do not constitute an attack on the Local Government, though there has been a tendency in the course of the argument addressed to us on behalf of the Crown to identify the Criminal Investigation Department with the Local Government. A plain reading of the articles amply justifies the view that the writer had no motive or intention to embarras the Government. In my opinion, these articles plainly do not constitute a contempt of this Court, however much one may regret that comments should be published upon a case under judicial investigation : *Skipworth's Case*[1].

There is finally one important point which I desire to emphasise. The insistence with which this application has been placed before the Court by the Advocate-General plainly indicates that it has been overlooked on behalf of the Crown that an applicant is not entitled as a matter of right to an order for the commitment of a person for contempt, but that the application is always addressed to the discretion of the Court. The power, it is well settled, must be exercised with caution and only when the case is clear beyond controversy, because as Sir George Jessel observed in *Plating Company* v. *Farquharson*[2] it is an arbitrary jurisdiction. There is no limit to the amount of the fine which may be inflicted or to the length of the term of imprisonment which may be directed; there is no appeal as a matter of right against an order of attachment. Besides, as observed in *O'Shea* v. *O'Shea*[3] it is the only criminal offence summarily punishable. The Court will consequently not make an order for attachment, unless it is satisfied beyond dispute that the order is needed peremptorily in the interests of the administration of justice. Reference may usefully be made to the emphatic warning given by eminent Judges against the inconsiderate use of this power : *Reg.* v. *Purnell*[4], *Reg.* v.

[1] (1873) L. R. 9 Q. B. 230, 232.
[2] (1881) 17 Ch. D. 49.
[3] (1890) 15 P. D. 59.
[4] [1900] 2 Q. B. 36.

Gray[1], *MacLeod* v. *St. Aubyn*[2], *Reg.* v. *Dolan*[3], *In re Clements*[4]. This reluctance of the Courts to take action, except in cases of great gravity, may be traced to quite respectable antiquity. Historians record that when Emperor Augustus desire to punish a historian for contempt, Mecænus advised him that the best policy was to let such things pass and be forgotten. Cæsar said on a similar occasion that to retaliate was only to contend with impudence and put one self on the same level, and even Tiberius acted upon the same view. The Theodosian Code also made this the law and expressely declared that slanderers of Majesty should be unpunished, for if this proceeded from levity, it was to be despised, if from madness it was to be pitied, and if from malice, it was to be forgiven, for all such sayings were to be regarded according to the weight they bore.

After an anxious consideration of the articles and of the arguments addressed to us on behalf of the Crown by the Advocate-General, my deliberate conclusion is that the application is entirely misconceived and no order for attachment should be made. In my opinion, the application must be refused with costs.

Application refused.

NOTE.

The main question for the consideration of the Court in this case is whether the High Court of Calcutta has jurisdiction to commit for contempt of an inferior Criminal Court. The determination of the jurisdiction of the High Court in this matter involves an inquiry into its constitution and the jurisdiction, power and authority it has inherited or may otherwise posses (See pp. 202-213, 237-242). In this case we have the history of the constitution of the old Supreme Court (King's Court) and the Sudder Dewany and Sudder Nizamut Adawlut (East Indian Coys. Court) The power of the High Court in the exercise of its original civil juridiction to punish of contempt of Court is undisputed. But the question in this case whether the High Court as a Court of Record has authority to punish for contempt of a subordinate Court which is subject to its superintendence and over which it exercises appellate or revisional jurisdiction. This question has been answered in the negative. For the meaning of the expression Court of record see pp. 243—244. Anson's *Contract* 13th Ed. p. 66. Basis of such jurisdiction of the Court of Records has been mentioned

[1] (1880) 14 Cox C. C. 474.
[2] [1899] A. C. 549.
[3] (1907) 2 I. R. 260.
[4] (1877) 46 L. J. Ch. 375, 380.

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in p. 245. There are three different sorts of contempt, p. 253. Distinction between civil and criminal contempt mentioned in p. 252. For acts which may constitute contempt of Court See p. 253.

Ordinarily one Court cannot punish a contempt against another Court or Judge. The position however is different where the contempt is against subordinate officers of the Court, such a contempt is rightly regarded as contempt of the authority of the Court by which the officer was appointed. But a superior Court which exercises a power of superintendence over a subordinate Court does not necessarily possess by implication, power to afford to such Court protection against contempt of its authority. *In re Venkat Rao* (1911) 21 M. L. J. 832 has been dissented from in this case; see. pp. 129, 130.

Notice also that the question whether clause 21 of the Charter of 1774 will allow the application of the recently developed rules of law on this subject in this country has been left open. p. 248. It has also been held (1) that the "Legal Remembrancer" is not authorised to represent the Government on the Original Side of the High Court. (2) That the Criminal Investigation Department cannot be regarded in law to be the prosecutor in a criminal case.